Babasaheb Dr. B.R. Ambedkar

(14th April 1891 - 6th December 1956)

SHOUT
SHARE
IT

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These views are the views of a man, who has been no tool of power, no flatterer of greatness. They come from one, almost the whole of whose public exertion has been one continuous struggle for liberty for the poor and for the oppressed and whose only reward has been a continuous shower of calumny and abuse from national journals and national leaders, for no other reason except that I refuse to join with them in performing the miracle—I will not say trick—of liberating the oppressed with the gold of the tyrant and raising the poor with the cash of the rich.

—Dr. Ambedkar in

'Annihilation of Caste'.

DR. BABASAHEB AMBEDKAR
WRITINGS AND SPEECHES
Vol. 12

Edited

by

Vasant Moon

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Vol. 12

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Kumari Selja

सत्यमेव जयते

Minister for Social Justice and Empowerment
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MESSAGE

Babasaheb Dr. B.R. Ambedkar, the Chief Architect of Indian Constitution was a scholar par excellence, a philosopher, a visionary, an emancipator and a true nationalist. He led a number of social movements to secure human rights to the oppressed and depressed sections of the society. He stands as a symbol of struggle for social justice.

The Government of Maharashtra has done a highly commendable work of publication of volumes of unpublished works of Dr. Ambedkar, which have brought out his ideology and philosophy before the Nation and the world.

In pursuance of the recommendations of the Centenary Celebrations Committee of Dr. Ambedkar, constituted under the chairmanship of the then Prime Minister of India, the Dr. Ambedkar Foundation (DAF) was set up for implementation of different schemes, projects and activities for furthering the ideology and message of Dr. Ambedkar among the masses in India as well as abroad.

The DAF took up the work of translation and publication of the Collected Works of Babasaheb Dr. B.R. Ambedkar published by the Government of Maharashtra in English and Marathi into Hindi and other regional languages. I am extremely thankful to the Government of Maharashtra's consent for bringing out the works of Dr. Ambedkar in English also by the Dr. Ambedkar Foundation.

Dr. Ambedkar's writings are as relevant today as were at the time when these were penned. He firmly believed that our political democracy must stand on the base of social democracy which means a way of life which recognizes liberty, equality and fraternity as the principles of life. He emphasized on measuring the progress of a community by the degree of progress which women have achieved. According to him if we want to maintain democracy not merely in form, but also in fact, we must hold fast to constitutional methods of achieving our social and economic objectives. He advocated that in our political, social and economic life, we must have the principle of one man, one vote, one value.

There is a great deal that we can learn from Dr. Ambedkar's ideology and philosophy which would be beneficial to our Nation building endeavor. I am glad that the DAF is taking steps to spread Dr. Ambedkar's ideology and philosophy to an even wider readership.

I would be grateful for any suggestions on publication of works of Babasaheb Dr. Ambedkar.

Selja

(Kumari Selja)

Collected Works of Babasaheb Dr. Ambedkar (CWBA)

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FOREWORD

In this series of publication of writings and speeches of Dr. Babasaheb Ambedkar, the State Government has so far published 11 volumes and I am glad to release this 12th volume. As in the last 11 volumes, in this 12th volume the writings of Dr. Ambedkar are full of intelligence and stimulus to the thinking mind. It is amazing to observe the spectrum of Dr. Ambedkar's special concern for the humanity and equality, particularly, the various aspects which touch upon the democratic life in the modern society. In this volume, the articles which have been written by him occasionally find place together and how difficult it must have been to put these under one caption. No article is isolated. Every article of his is interlinked, may it be commerce or social antrhropology, English literature or English Constitution, the enquiry has a social orientation. The notes on various Acts and Laws which have been included in the volume also are the evidence of the kind that Dr. Ambedkar was a legal luminary and his basic thinking on jurisprudence. It is not only an advocacy but also analysis which is useful not only in the court-room but in the library of any intelligent student.

I am confident that this volume would be received well by the students of Dr. Ambedkar's thought and also by intelligent readers and members of public. I would like to place my appreciation of the work that has been gone into bringing out this volume and I am sure that the further volumes as planned will come through as scheduled.

(SHARAD PAWAR)
Chief Minister of Maharashtra State.

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PREFACE

The present volume of Dr. Babasaheb Ambedkar's Writings and Speeches is a testimony to his diligence in his early years. These writings cover a variety of subjects. From the law of evidence to Dicey's Law of the English Constitution and from Ancient Indian Commerce to the present day Parliamentary Democracy, it is a continuation of the philosophy of law as much as of various dimensions of its practice. These writings therefore are useful to show that in order to master a subject, there has to be a method in study. The method that Dr. Ambedkar followed was calculated to bring out concepts in their clarity, to appreciate reason of law in the perspective of its purpose so that in application law is fairly administered and correctly applied. Dr. Babasaheb Ambedkar was a Constitutional lawyer. He taught jurisprudence and in his appreciation of the rule of law in society, sociological dimensions of law are visible. It is in this context that the present miscellany of his writings has relevance today.

As a Professor of Law, Dr. Ambedkar stands in contrast to the present fraternity of teachers and professors. Of course, those were the days when reading original text was mandatory. Extensive reading with understanding was sine-qua-non of success. There were no disturbances, visual or auditory in the like of television, radio or loudspeakers. At the same time there was the belief that scholarship or knowledge brought its own reward. The most sought-after reward was knowledge of men in society, regulation of their inter-relationship, the role of law as an agent of civilization that brought peace to the Indian subcontinent for which Dr. Ambedkar was the ardent votary.

The present volume of his writings is a treasure trove of the methods of conceptual analysis and a store-house of ideas that age has not rendered obsolete. The average students and the scholars alike stand to benefit and will find that the reading of this collection of writings has enriched his personality.

(PRABHAKAR DHARKAR)
Education Minister.

NOTE ON EDITING

The People's Education Society, founded by Dr. B. R. Ambedkar has been in possession of various manuscripts and other papers of Dr. Ambedkar. The Society was pleased to spare Xerox copies of 71 titles of the writings of Dr. Ambedkar to the Government of Maharashtra for publication in the present series.

On scrutiny of these titles, many essays were found to have been included in Volume Nos. 3 to 5 of the series. Some of these titles were still unpublished and have been found quite relevant even to this day, which after careful consideration have been sorted out and included in the present volume.

This volume is divided into six parts. First part consists of Dr. Ambedkar's essays on India's commercial relations with Middle-East and Western countries since prior to the dawn of the Christian era. The Marathi biographer of Dr. Ambedkar, Mr. C. B. Khairmode has recorded that Dr. Ambedkar had submitted his dissertation for the Degree of Master of Arts to the Columbia University on Ancient Indian Commerce. Three essays found on this subject carry Chapter Nos. 1, 2 and 5. The subject of Dr. Ambedkar's dissertation was subsequently changed. However, the manuscripts on the subject have been found quite useful for a student of History which reflect young Ambedkar's depth and clarity in Ancient Indian History and its commerce from pre-Christian era to the advent of the British rule. The essays are handwritten with calligraphic beauty.

Second part of the present volume contains Dr. Ambedkar's essay which was probably written during the period of his visit to London between 1930 to 33 for the Round Table Conferences.

This is a 123 page typed copy of the manuscript in which many pages were left incomplete and in some places, even quotations are not inserted. The essay was meant to present a case to the British Government for introduction of social legislation to remove the untouchability.

Third part contains lectures on the English Constitution which were prepared during the year 1934-35 for delivering to the students of Government Law College where he was teaching law. We have received these essays in piecemeal. Preface contains 3 pages, then Book II consists of 12 pages, description of Parliament is included in 33 pages and consists of 3 Chapters. Thereafter, under Chapter 5, Powers and Privileges of the Lords and the Commons has been covered in 21 pages. In all these Chapters, some pages have only few lines and some have been left blank, which has been indicated wherever necessary. All these pages are typed on roolscap.

The Chapter on Paramountcy and the claim of the Indian States is a 21 page typed copy having corrections, additions and alterations in the handwriting of Dr. Ambedkar. It seems that this statement was meant for issuing to the Press.

Fourth part comprises notes on various acts and laws prepared for the use of lectures to the students of Government Law College during 1929-37. Relevant copies of manuscripts received from the People's Education Society included in this part are as under:—

(1) Common Law—129 handwritten pages.

(2) Dominion Status—43 handwritten pages.

(3) The Law of Specific Performance—77 handwritten pages.

(4) The Law of Trust—160 handwritten pages.

(5) The Law of Limitation—58 handwritten pages.

(6) The Law of Criminal Procedure—109 handwritten pages.

(7) The Law of Transfer of Property—128 handwritten pages.

(8) The Law of Evidence—223 typed pages.

Except the notes on Law of Evidence, all others are handwritten. The Xerox copies were first converted into typescripts to facilitate composing by the Press. After the Press Copy was composed and the proofs were received, they were cross checked with the Xerox copies of the handwritten manuscripts in our office. During this process it was noticed that many pages were not legible and therefore proper meaning was often unclear. It was therefore necessary to cross-check these proofs with the original manuscripts. It took several months of work in the "Rajgriha", the home of the Late Dr. Babasaheb Ambedkar where the original manuscripts are being preserved by the People's Education Society. In that process, we discovered that Dr. Ambedkar had carried out several corrections, alterations and additions in pencil which had not appeared in Xerox copies. All such corrections were meticulously carried out during the proof reading.

The original notes were not chronologically organised. Some of the original pages were soiled so much that words were either missing or erased. Maximum precaution was taken to bring out these notes as authentically as possible.

Fifth part of the present volume consists of Dr. Ambedkar's autobiographical notes which were recently published in a booklet by the People's Education Society in 1990. The title of this essay is "WAITING FOR A VISA".

Sixth and the concluding part deals with some more unpublished miscellaneous jottings of Dr. Ambedkar. The subject of slavery in the Roman Empire and in America is also discussed in one of the essays. Here Dr. Ambedkar tries to prove how untouchability is worse than slavery.

Miscellaneous writings of Dr. Ambedkar are difficult to classify. Dr. Ambedkar wrote on a variety of topics and before he wrote, like Macaulay, he had read extensively, took notes deligently, and words, phrases and thoughts became part of his memory and are reflected in everything that he wrote. All such writings are relevant even today in order to understand this multifaceted genius.

I owe personal gratitude to Mr. Justice R. R. Bhole and Shri Ghanshyam Talwatkar, present and the past Chairman of the People's Education Society, Bombay respectively, for their deep concern about the whole project of Dr. Ambedkar's writings in general and his manuscripts in particular. It was because of their personal interest that I could get access to the various manuscripts in possession of the Society and the Government could reprint the 'Buddha and His Dhamma' as Vol. 11. Shri R. G. Ruke, the Librarian-in-Charge of Dr. Ambedkar Research Centre, Rajgriha, Dadar, Bombay has always been helpful and cooperative in extending whatever help we asked for.

The work of editing of this volume has been made possible by the ready help, support and co-operation I have received :—

(1) from Shri Sharad Pawar and Shri Sudhakarrao Naik, present and the former Chief Ministers of Maharashtra, who have always encouraged this project;

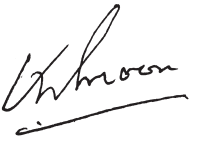
(2) from Shri J. D. Jadhav, Secretary, Higher and Technical Education, Government of Maharashtra and Shri B. M. Ambhaikar, Additional Commissioner, Bombay Municipal Corporation, who have ever been ready to give guidance ;

(3) from Shri Shrikant Talwatkar, Librarian of the Siddharth College, Bombay who provided valuable sources for reference;

(4) from Shri B. T. Kamble, Deputy Secretary, Higher and Technical Education, Shri P. S. More, Director, Printing and Stationery, the staff of the Government Press at Nagpur, and

(5) the staff of our office comprising of Shri Salil Waghmare, Mrs. S. M. Newarekar and Shri R. T. Sutar, who assisted in the process of editing of this volume;

all these and others whose names have not appeared inadvertantly, deserve my sincere gratitude.



(VASANT MOON)
Editor.

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later to 10%. The average rate during the Century would work out at about 9%—and it only rose above from 1768 to 1771. In 1720 a slight fall was caused by the Competition of the French Company, and a further fall of 1% followed an increase of Capital and the foundation of the Swedish Company in 1738. In 1744 it rose again to 8% and Continued at this rate for eleven years in spite of the Continual war both in Europe & in the Carnatic. In 1755 the unsettled Condition of the Affairs at last had effect & a fall of 2½% resulted. In 1760 the Cession of Burdwan & other provinces incre the working Costs of the Company, and kept the dividend at 6%, so that the sum distributed was £191,644. In 1767 in Consequence of the Acceptance of the territorial Sovereignty of Bengal, the dividend was raised to 10% and the Amount distributed reached £319,408. This rise was quite unjustifiable and was largely due to the Exaggerated Estimates of the prosperity of India. The increased dividends declared in anticipation of large profits which were never fully realized, were paid by means of loans raised at exorbitant interest. For five years the Company hung on in the hope of better days, but in 1772 the Crash Came & the dividend fell from 12½% to 6%. Lord North then intervened, and, for the future, the Company's dividends was subject to the ministerial Control. The Regulating Act was followed by renewed prosperity & the dividend Continued to rise slowly. In 1792 the Conclusion of the peace with Tipoo, where by the Company received a revenue of £240,000 and an indemnity of £1,600,000 was

Facsimile of Dr. Ambedkar's handwriting
during his student-days in America in
the year 1915-16 ; pages from ' Ancient Indian Commerce'.

Articles	East-Indies	West-Indies etc
	£. s. d.	£. s. d.
Sugar per Cwt	1. 12. 0.	1. 4. 0
Coffee per lb	0. 0. 9	0. 0. 6
Spirits, Sweetened per gallon.	1. 10. 0	1. 0. 0
" , not. "	0 15. 0	0 8. 6
Treacle and Cakes per lb	0 0. 3	0 0. 2
Succades	0. 0. 6.	0. 0. 3
Tobacco "	0. 3. 0	0. 2. 9.
Wood teak under 8 inches square per load	1. 10. 0	0. 10. 0
Drugs not particularly enumerated ad valorem	20 per Cent	5 per Cent.

The English tariff on Indian goods was not not only discriminating but differed with the use to which they were put in England as will be seen from the following answers of Mr Raw John Rawlinson to the questions of the Committee of House of Commons in 1813

Q. "Can you state what is the ad valorem duty on piece goods sold at the East India House?".

A. "The duty on the Class called Calicoes is £3, 6 S. 8 p. per Cent upon importation and if they are used for home Consumption there is a further duty of £68, 6 S. 8 d. per. Cent."

"There is another class called muslins, on which the duty on importation is 10 per cent. and if they are used for home Consumption of £37, 6 S. 8 d. &c.

PART I

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ANCIENT INDIAN COMMERCE

ChapterI—Commercial Relations of India in the Middle East.

Chapter II—Commercial Relations of India in the Middle Ages.

Chapter III—India on the eve of the Crown Government.
[This chapter is numbered as Chapter V in the MS. It seems that Chapters III and IV were lost.]

[The material in this part consists of 3 chapters (originally numbered as I, II and V) on the Ancient Indian Commerce which was a subject of dissertation in fulfilment of the requirement of M.A. examination of Columbia University by Dr. Ambedkar, during 1913—15 who later switched over to a new topic, now known as 'Administration and Finance of the East India Company' published in Vol. 6 in this series. A facsimile of his handwriting (during 1913—15) is printed alongside showing Dr. Ambedkar as a Caligraphist to be emulated by younger generation—ed.]

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CHAPTER I

COMMERCIAL RELATIONS OF INDIA IN THE MIDDLE EAST

†The imperial Romans flashed their sword both in the East and the West with different results. In the East "they conquered the world only to give it to"[1] *(.....) in the West however "they either Romanized the races who were at first their subjects *(.....) masters, or left those races to be the willing agents of their own Romanization."[2]. As a result of this Romanization the West is proud of her heritage from the Romans. How this rich heritage was accumulated none has taken pains to inquire into.

Justly may we look to the Romans for their military organization, the elaboration of law and the wonderful discipline of hordes levied before war and discharged after victory. Hemmed in from all sides—the Etruscans pressing in from the north, the Lygurians from the West, the Sabians from the East and the Greeks from the South, the Latins summoned the energy by dispair. Excepting perhaps the women and youngsters of both sexes the entire population was one huge militia ever ready to rally round the red flag at the call of a trumpet. But Rome gathered in energy too voluminous for the space she had and illustrated the principle that concentration causes explosion and expansion. Goaded by the greed of territory or pressed on by the mania of foreign persecution she started first by consuming the entire Italian peninsula. But imperialism conscious or unconscious knows no stop. Rome by sheer prowess of her arms went on in her career of conquest and made war her only noble profession. She knew not that war like competition destroys itself. In one great sweep, she brought an immense territory

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†First page of the MS. is missing. The MS. starts from the 2nd page—ed.

* Portion eaten by moth or white-ants is shown by asterisk in brackets—ed.

[1] Quoted by Earl of Cromer "Ancient and modern Imperialism", p. 72.

*[2] *Ibid.,* p.73.

under her control but left the circle of her extensive imperium to shrink back towards the centre when the propelling energy from within had, as it was sure to be, exhausted itself.

Beside their military exploits and inhuman gladiatorial feats, the Romans (owed)* credit from the art of road-building and administration; these arts are quite natural and necessary concomittants of imperialism. (Beside these)* there (was)* little of the Roman contribution to civilization that cannot be summed up in the phrase *pax Romana.*

Underneath the canopy of Roman Imperialism there was a constant and "peaceful in filteration", (of the East)*. Philosophy, astronomy, mathematics, medicine constitute her bequests. Scholarship incompatible with the practical genius of the Romans, was the trade of the Orientals. The Roman Court was begemmed by the stars from the East. Egypt lays claim to Ptolemy and Plotinus: Porphyry and Iamblichus are the sons of Syria while Dioscorides and Galen were Asiatics. Much of the Roman Civilization was made up by the doings of the Eastern slaves who even conducted the education of the Roman children in the public schools established under the empire. Romans were the lovers of the powerful rather than of the beautiful: "Rome, in herself inartistic, enlaned art and artists for her own purpose. Her barbaric delight in vivid colouring, which for instance, was exhibited in the gold and scarlet decoration on the great column of Trojan, was stimulated by eastern commerce"[1]. Even Roman architecture is the product of the oriental slaves. The entire strength of Rome was spent in conquest or if we choose, in the struggle for existence. But after enough of struggle she might have as well utilized the leisure which was hers and availed herself of the varied geniuses brought within her compass by her subject people. Unfortunately Rome never realized or it was too late (that she)* did that "peace hath her victories no less renowned than war" and (her)* militarism pure and simple is thrown in great relief when we notice the (.....)* fact that "although Rome raised a statue to Quiet,

* Portions in bracket are eaten by termites. Words supplied—ed.

[1] W. R. Paterson, "*The Nemesis of Nations*", p. 307.

she (.....)* out (.....)* walls"[1]. Though Rome had some industries, her productive capacity was miserably low; her consumption overran her production which necessiated continual drain of specie. The Latefundia destroyed her agriculture and (drove)* the farmers to beggary and made Rome entirely dependent for her food on Sicily and Egypt. Owing to the great concentration of landed property the land had ceased to be productive, and there was practically no Italian harvest. She received everything mostly from the East and nothing or little to give in return.

"It is in the orient, especially in these countries of old civilization that we must look for industry and riches for technical ability and artistic productions as well as for intelligence and science, even before Constantine made it [Rome] the centre of political power".[2] Nay "all branches of learning were affected by the spirit of the orient"[3] which "was her superior in extent and precision of its technical knowledge as well as in the inventive genius and ability of its workman".[4] Descending from the productions of industrial arts to those of industry itself, one might also trace the growing influence of the Orient: one might show how the action of the great manufacturing centres of the East gradually transformed the material civilization of Europe ; one might point out how the introduction in Gaul of Exotic patterns and processes changed the old native industry and gave (their)* products a perfection and a popularity hitherto unknown."[5] From time immemorial upto the Industrial Revolution, the East enjoyed (the)* pre-eminence of being the workshop of the world and it is significant to (note that)* she was busy in producing the wonderful and massive iron columns that attest to the mechanics and technique of the time when chipping a stone and making a hatchet was a superhuman task with the Western neolith.

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* Portions in brackets shown by asterisk are eaten by termites. Words supplied—ed.

[1] W. R. Patterson, *"The Nemesis of Nations",* p. 334.

[2] Franz Cumont, *Oriental Religions in Roman Paganism,* p. *2.*

[3] *Ibid,* p. 6.

[4] *Ibid, p.* 8.

[5] *Ibid, p.9.*

Thus "the East gave (impe)* tus to the West."[1] It is in the valley of the Nile, the Euphrates, the Yangtse Kang and the Indus that we first witness the misty dawn of civilization, the beginning of knowledge and progress." To have caught the light from the East and reflected it with manifold lustre on the West is the only work of Greece and Rome."[2]

Looked at from this angle the dragon of "Dark Ages" seems to be a fictitious creation of the historian. Were there any such Dark ages in Europe ? If so, when was there light ? History does not disclose it. Whatever light or civilization there was, was confined to the Eastern basin of the Mediterranean [being constantly fed by the Orient] barring which the entire continent of Europe was in barbarism till very late : the Curve of European Civilization (leaving aside the sources on which it drew) is constantly rising and what the historian calls Dark ages mark a point of civilization higher than the one reached by preceding centuries. The fiction of the 'Dark ages' arose from the fallacy of the thinking of whole of Europe in terms of Rome, but nothing is more false than to think of the whole in terms of a part.

To be true to facts the question of the 'Dark Ages' has to be raised (by the) historian of the Orient. It is he who has to answer why this great (fall) after a high crest, why this sudden darkness after the (dawn):

It is lamentable to see that the earliest and most promising civilizations ran into a blind alley and were arrested all of a sudden when progress was most expected of them. Some of these early civilizations died out leaving us their records on bricks and tablets. Others are lingering on in their way and are in the process of rejuvenation.

The civilization of India is one of the oldest but like all of them has come to a dead stop : but it has lived to revive and we may hope never to die again. The contact of the west has shaken the "fixity" and restored her old dynamic power.

* Portions in brackets shown by asterisk are eaten by termites. Words supplied—ed.

[1] Brooks Adams, *Law of Civilization and decay,* p.

[2] R. C. Dutt.

Historians often wonder why civilization begins at one particular spot rather than at another. Is it because of the ability of the inhabitants ? Or is it because that providence wills them their civilization ? A short consideration will convince us that both these factors play the second fiddle. The first is played by environment. Given a bountiful environment and chances of conservation, isolation or security from foreign invasion, civilization is bound to sprout forth.

India's geographical position just fitted her to be the Early craddle of civilization. Nature has given her that isolation that has been the envy of many of tribal people who are ever in search of a secure abode to develop their capacity and make the most of nature's gifts. Severed from China and Tibet on the north by the Himalaya mountains, on the East from Burma and Assam by the Tenasserim and on the west from Afghanistan by the (Karakoram)* (Hindukush)* Ranges the entire peninsula forms a world in miniature in itself—(formed)* by strong natural defences— "the mountains"[1] forming "a wall on the North-West and the sea .. a moat on all other sides."

This "inverted triangle" conserves the most varied and most abundant of natural resources. "Animal life is not only abundant in British India, but it is remarkably varied. The number of kinds of animals inhabiting India and its dependencies is very large, far surpassing, for instance, that of the species found in the whole of Europe, although the superficial area of Europe exceeds that of the Indian empire by about one-half"[2]. Equally is her rich diversity of flora and fauna and her climate that makes possible the existance of such varigated animal life. The richness of vegetable life is unbounded. All these factors have from time immemorial combined to bestow upon her the economic self-sufficiency which has been the privilege of a few nations on the face of this planet today.

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* Portions in brackets shown by asterisk are eaten by termites. Words supplied—ed.

[1] Thompson E. W. "*History of India"*, p. 2.

[2] *Imperial Gazetteer of India,* Vol. I, p. 215.

Given the materials, man can hardly be expected to remain inactive for the economic motive is the strongest and the most dynamic of all. He tries at once to exploit the environment for his well-being and the early inhabitants of India were no exception to the rule. It would be a mistake if we take a modern average Indian as a prototype of his stalwart ancestor. He may resemble him perhaps in features but that's all. The semblance ends there. The India of antiquity within the span of time in which he held the undisputed possession of the country accomplished much more than could be expected of primitive. We have scanty records of his deeds but what little we have and as will be seen from the following narrative, speaks volumes.

Of the multifarious achievements of the ancient Indians, important as they are, we are not concerned. We have to centre our attention on their economic activity alone.

At the outset it would be better to take note of the lampposts or the sources that will help us in our survey. On the nature side there is a lamentable paucity. The Hindoos are loquacious on everything except the economic activity of their life and the reason is not far to see. Education was monopolized by a class of people who were more or less "drones in the hive, gorging at a feast to which they [had] contributed nothing". The Brahamin or the intellectual caste of India enjoyed "the conspicuous leisure" and "the conspicuous consumption" vicariously ; consequently the economic activity of the ancient Hindoos found no exponents and no mention in the literature which is purely sacerdotal. This also explains why India did not produce any literature on the Science of Economic as such. Hence we are compelled to depend entirely on foreign authorities and their scanty reference to India's commerce.

Before we launch on the subject of commerce we shall do better to take hasty survey of the Economic development of Ancient India. There is no authority on the subject that can take us back to the pre-Buddha times. The Buddha Jatakas—the birth-stories of Buddha—are the earliest source on the subject and contain literary references to the economic organisation of the Indian society which may be supposed to have existed from times very remote from the dates of these Jatakas . . . . . .

I. Agricultural Organization:

Very early we find the ancient Hindoos living a village life : Each village consisted of from 30 to 1000 families. No isolated houses were to be found but they clustered together. Agriculture is known as the highest occupation and the Indian proverb puts the merchantman second to the farmer and the soldier occupies the last place in social gradation.

Land was cultivated by the farmer and his families and some times by hired labour. "The traditional feeling was apparently against land transfer". Yet we see that land was rented out for cultivation. Independent landholder was regarded respectfully but work on the farm of a capitalist was greatly disapproved. There is no evidence to definite say whether or not there was feudalism in village community.

There was a great deal of co-operation among villagers for building and repairing roads and tanks and municipal buildings:

> "The sovereign claimed an annual *tilha* on raw produce. This was levied, and in kind amounted to 1/6,1/8,1/10 or 1/12." "Grain, pulse, and sugarcane were the chief products : vegetables, possibly also fruit and flowers were cultivated. Rice was reckoned as the staple article of food."

Agriculture was a common occupation for even we see the Brahmin figuring as a goatherd and both as a small and large landholder without losing his caste. The love of the ancient Hindoo and for that matter of the modern for agriculture transcends that of the ancient Greek and is just manifested in the worship of the cow.

The Hindoo devotion to the Cow has been an enigma to most of the foreigners and above all has been an efficient lore in the hands of those half-baked theological failures who go to India to conduct their missionary propaganda for blackmailing the Hindoo.

The origin of cow worship is as much economic as that Roman practice of not offering wine to the Gods from unpruned vines. The cow and for that matter all draft animals, is the soul of the farmers. The cow gives birth to oxen which are absolutely

necessary to the cultivation of the farm. If we kill the cow for meat, we jeopardize our agricultural prosperity. With full foresight, the ancient Hindoos tabooed cow-flesh and thus prevented cow killing. But man hardly pays any attention to dry rulings. It must have religious sanction ; hence the grotesque mythology around the cow in old Hindoo religious literature.

II. Organization of Labour, Industry and Commerce :

Be it said to the credit of the Hindoos that slavery paid a very little role in their economic life. Capture, judicial punishment, voluntary self-degradation and debt were the four principal causes by which individuals become slaves. But there is considerable evidence to show that kindly treatment was the rule and manumission was always possible. Besides few slaves there was a considerable amount of free-labour paid in money or food.

From among the industrial classes the following are mentioned :—

(a) The *vaddhaki* is a genuine term and is an embodiment of a carpenter, ship-builder, cart-maker and an architect.

(b) The *Kammara* is a generic term for a metal craftsman producing "iron implement, from a ploughshare or an axe or for that matter, an iron house, down to a razor, or the finest of needles, capable of floating in water, or again, statues of gold or silver work."

(c) The *Pasanakottaka* is a generic term for a mason "not only quarrying and shaping stones . . . . . but as capable of hallowing a cavity in a crystal, a matter probably of requiring superior tools."

"A considerable degree of organization characterized all the trading industries. Certain trades were localised in special villages, either suburban and ancillary to the large cities, or themselves forming centres of traffic with surounding villages e.g. the wood-work and metal work industries and pottery . . . . . within the cities trades appear to have been localized in special streets e.g. those of ivory workers and of dyers."

The trades were well regulated and were superintended by one or two headmen who were the chiefs or syndics of municipal and industrial organization of the cities.

There were numerous guilds *(Seniyo)* under the headship of a President *(Pramukha)* or elder or older man *(Jethaka).*

Carpenters, smiths, leather workers, painters, and experts in various arts had their grids. Even the sea-men garland-makers and carvan traders.

There was a tendency towards hereditary occupation. But the caste system in all its hiedous rigourousness was not present and even Brahmins were often occupied in low professions.

There was little riverine traffic : it was mostly conducted by the caravans. The industrial centres were connected by good roads which greatly facilitated traffic. The Ramayana refers to a road starting out from Ayodhya the capital of King Dasharatha, known presently as Oudh to Rajagriha the capital of Kekayas in the vicinity of the Himalaya mountains situated on the River Bias, the ancient Vipasa known to the Greeks as the Hypasis passed through Hastinapur (Delhi) the capital of the Kurus. Alexander's information regarding the roads in ancient India is perhaps the most accurate and the greatest source for the employed surveyors to measure the Indian Roads. We glean from this source that a road ran from Penkelaotis (Pushkalavati) near the modern Attock passed on through Takshila to Patalipura (Pata) after crossing the river Bias. Another road joined Pushkalavathi and Indra-prastha (Delhi) and after connecting Ujjayini (Ujain) descended down the Vindhya range, went into the Deckan through Pratisthana after crossing the Nerbuda and the Tapty. There were the internal highways of traffic and it was carried on by Uday of the Caravans. Early in India the external and internal commerce had assumed such importance that we find mention in the Buddha Jataka a league of caravan leaders. The caravan leader or Sattravaha in Pali headed the caravan on its journey and was looked to "for directions as to halts, waterning, precautions against robbers, and in many cases as to routes, fords, etc." The journey of the Caravan was mostly by night.

Trade in early India was not entirely individualistic. There is enough evidence to show the corporate commercial activity and partnership in Trade were occasional, if not general. There was very little government control of business and that too only so far as it concerned the Royal purchases. The prices of articles of

Royal purchases were fixed by a Royal valuer who would "also assess the merchants for the duty of a twentieth, presumably *ad valorem,* on each consignment of native merchandise, and of a tenth *ad valorem* plus a sample, on each consignment imported from overseas Finally, he would have to assess merchants for their specific commutation of the "rajaksaya" viz. one article per month sold to the king at a certain discount"'

Later on however prices came to be fixed: for Manu says that the king on every 5th or 9th day fixed the rates for the purchase and sale of marketable commodities.

The introduction of money in India whether it was borrowed or invented at home is a matter of great controversy : but whatever may be said on this, it is true that the use of money in India was early known for "the whole of the Buddhist literature testifies to the fact that the ancient systems of simple barter as well as of reckoning value of cows, or rice measures had for the most part been replaced by the use of metal currency, carrying well understood and generally accepted exchange value". Currency counted of coins but was not regulated by Royal authority. There was gold coinage for the most part and "all marketable commodities and services had a value expressible in terms of cash". Banking was not very highly developed—there was no taboo on loaning of money and according to Gautama interest was sought in six different ways.[1]

With such high type of economic development it is but natural that there should be commercial expansion of colonization by the Early Hindoos. Historians however have been very reluctant to accept the fact : they have either judging the present by the present rule upon the entire Hindoo population as incapable people or have exerted their utmost ingenuity to discount any evidence that antagonises with their preconceived bias. Isolation of India has been a trump card with them and they use it as often as they can. Environmental conditions do delimit the activity

[1] The information on the early Economic Organization of India has been borrowed from the article in the Journal of the Royal Asiatic Researches for 1901, p. 859 by Caroline Foley Rhys Davids M. A.

of a people subject to it but it could be foolish to say with Hirder "that history is geography set in motion." We might hold to the truth in the statement that geographic conditions have condemned India to her lot and yet condemn the hyperbole in it

We may agree, if we like, with Montesquieu when he ascribes the "fixity" of oriental manners, customs and religion to its warm climate. We may believe in Buckle when he holds nature's overpowering mountains and forests in all their stupefying greatness as are to be found in India responsible for the abnormal workings of imagination and superstition or we may follow the scientific geographer when he asserts that India has been condemned to isolation on account of her geographic location : isolated from China by the Himalaya mountains and from Persia and Afghanistan by the Hindu Kush mountains. She has a long waterfront but the eastern and the western ghats that fringe the coast from within and cut off the call of the ever beaconing sea to maritime activity.

All these allegations perhaps have a modicum of truth in them: but it would be a mistake to make strong arguments out of them. Barriers, no matter how strong, are never insuperable to man. He has tried everywhere to control them and has succeeded in his effort.

Hemmed in from all sides, the early Indians burst asunder all impediments natural or otherwise and launched into the Indian ocean at a very early date. The Indian ocean has much in common with the mediterranean. Mr. Zimnurn argues that "land locked on all sides . . . . . the mediterranean seems in summer as gentle as an inland lake . . . . . It is in fact double-natured . . . . . a lake when the Gods are kind, and the ocean when they are spiteful."[1] The Indian ocean which is but the enlarged mediterranean sea with its southern coast removed is neither a ocean nor a lake but is according to Ratzel only half an ocean. The inclosed character of its northern part deprives it of the hydrospheric and atmospheric peculiarities of a true ocean

[1] *The Great Common Wealth,* p. 20.

and the winds and currents ran over it in an unorganized way owing to the close by lands. The North-east and South-east monsoons soon enabled the merchants to drag forth in the mid-ocean instead of hugging to the coast.

> "From the dawn of history the northern Indian ocean was a thoroughfare. Alexander the Great's rediscovery of the old sea route to the orient sounds like a modern event in relation to the gray ages behind it. Along this thoroughfare Indian colonists, traders and priests carried the elements of Indian civilization to the easternmost Sunda isles; and oriental wares, sciences and religions moved westward to the margin of Europe and Africa. The Indian ocean produced a civilization of its own, with which it coloured a vast semi-circle of land reaching from Java to Abyssinia, and more faintly, owing to the wider divergence of race, the further stretch from Abyssinia to Mozambique."[1] The Hindus became the dominant commercial nation of the Indian ocean long before the great development of Arabian sea power, and later shared the trade of the East African coast with the merchants of Oman and Yemen. Today they form a considerable mercantile class in the ports of Mascat, Aden, Zanzibar, Pemba and Natal."[2]

With this preliminary disquisition about the natural resources and the economic development of India we will trace her commercial intercourse from very early times with other countries of ancient civilization.

To begin with Egypt. At the outset it would be better to premise that the evidence of a commercial intercourse between India and other countries at the dim dawn of history is very flimsy and is embedded either in tradition or in articles excavated from early ruins: The evidence however ripens into positiveness with the advance of time.

Situated in the most rarely endowed location in the world the Egyptians were economically independent of the rest of the people—and it is even said that they prided economic self-sufficiency to such an extent that they tabooed foreign intercourse; but this is carrying things too far and though we have no positive records to disprove the statement, the foreign articles found in the process of excavation form a strong proof against it.

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[1] Ellen Churchill Semple—"*Influences of Geographic Environment",* p. 309.
[2] *Ibid,* p. 268.

It is a matter of great controversy whether or not the Egyptians had direct trade with India. Hypercriticism has ranged on both sides. Herodotus says that Sesostris whom the Gardiner Wilkin son identifies with Ramses II fleeted out a strong fleet and sailed beyond the straits into the Indian ocean conquering all the coastal countries while his land forces carried their sword as far as the Ganges.[1]

Long before the exodus of the Israelites from Egypt, India had commercial intercourse with her and the port of Philoteras was the emporium of that early trade :

> "Whether they (the Egyptians) had a direct communication with India at the same early epoch, or were supplied through Arabia with the merchandise of that country, it is not possible now to determine: but even an indirect trade was capable of opening to them a source of immense of wealth; and that the productions of India did actually reach Egypt we have positive testimony from the tombs of Thebes" [2] and "the productions of India already came to Egypt at the early period of Joseph's arrival in the country is evident from the spices which the Ishmaclities were carrying to sell there : and the amethysts, hacmatile, lapis-lazuti, and other objects found at Thebes at the time of the Third Thothmus and succeeding pharaohs argue that the intercourse was constantly kept up."[3]

Culture in all times follows the wake of Commerce. This is more true of ancient times than of the modern. The caravans of the olden times were not only the carriers of wares but also of civilization : they dissiminated and universalized it. This commercial intercourse with India greatly affected the architecture of Egypt so much so that "James Fergusson (*History of Architecture* I, 142-3) notes that the great monolith at Axum is of Indian inspiration; "the idea Egyptian, but the details Indian. An Indian nine-storied pagoda, translated in Egyptian in the first century of the Christian era !" He notes its likeness to such Indian temples as Bodh-Gaya, and says, it represents "that curious marriage of Indian with Egyptian art which we would

[1] *cf.* William Robertson *"Disquisition on India"*,(1812) p. 6.

[2] Gardinaer Wilkinson, "*The Ancient Egyptians",* Vol. I. p. 161.

[3] Gardiner Wilkinson, "*The Ancient Egyptions",* Vol. I. p. 250.

expect to find in the spot where the two people came in contact, and enlisted architecture to symbolize their commercial union."[1]

It will not be out of place to note the relation of the Dravidians, the earliest inhabitants of India though by no means aborigines with the people of western Asia. Mr. Gustav Oppert says, "It is established now, beyond any doubt, through the decipherment of the Cunciform inscription, that the Turanian Empires had advanced to a high degree of culture. This civilization, though tainted with strange materialism proved itself nevertheless able to develop to a high degree of perfection certain branches of arts and science. To these Turanians who differed much among each other in idiom belong also to the Dravidians of India of our days, who in those times occupied Ariana and Persia. In Europe, these Turanians appear to be represented by the Esthonians, and in many places of western and central Asia, they formed the substratum of the population, while they supplied in China the ground work of the civilization of the celestial empire." These Turanians "had founded empires throughout the old world. The home of the Turanians is assumed to have been the country round Lake Aral. Thence they spread over the greatest part of Asia, reigned there paramount for at least 1500 years." The Egyptians, the Assyrians the Akkadians, the Sumerians, the Phoenicians are all branches of the same Turanian race. "About 250 years after the Egyptian empire had been established i.e. 2500 B. C, and after the Akkadian dynasty had reigned for a long period in Babylon the Aryans invaded Chaldea, and pressing at the same time on the Kannanites of the Persian Gulf and the Dravidians in Persia, drove the former towards the North-west and the latter to the South-east to India". The Aryans when they invaded India met with a stubborn resistance from these Dravidians. For "they did not go beyond the frontiers of the Punjab till the fifteenth century before Christ".[2] Next in importance and chronology

[1] "*The Periplus of the Erythraean Sea"*, Translated and annotated by W.H. Scoff, p. 66-67.

[2] *cf.* Gustav oppent, "*On the Ancient Commerce of India"* in "The Madras Journal of literature and Science" 1878, pp. 189, 90, 91; for parallels between Malbarian and Egyptian customs *cf* "Primitive Civilizations" by E. J. Simcox Vol. I. pp. 183, 550, 554, 569, 570, 574, Vol. II. p. 473.

comes the intercourse between India the kingdom of India. In spite of the evidences to be found in the Bible, writers have been very little disposed to credit it for historical purpose. The evidence is too strong to be slighted".[1] Suited in the mainland, Judea was not in a position to develop a direct trade with India. She had no water-front at all and consequently no harbours. She had entirely to depend upon the Egyptians and the Syrians who controlled the sea and the trade routes of India. The galleys of India brought their goods to Yemen or Arabia Felix. Yemen was the great mart for Indian goods : it was a distributing centre and from it Indian commodities were taken to Syria by the caravan or to Egypt by the Egyptian Vessels. "From the very earliest ages the refined civilization of Egypt and Syria sought with avidity the spices, the aromatics, the metals, the precious and scented woods, the gems, the ivory in a kind, all the valuable merchandise which the rich soil of India supplied in abundance."[2] King Solomon, however, when he came to the throne, tried to get the control of Indian trade. He saw that the Egyptian power was on its decline and realized that importance of utilizing Idumee as sea port on the Red Sea and which had inherited as the conquest of his father—for materialising his plans of direct trade relations with India. But since the Jews had not been experienced in the art of navigation, he had to seek the cooperation of Hirain, the king of the Phoenicians. The Phoenicians were the pioneers in navigation. Whether they dealt directly with India is a subject of great controversy. Mr. Robertson is favourably inclined. After showing how the poverty of the land compelled the Phoenicians to subsist by commerce, he goes on to say, "among the various branches of their commerce, that with India may be regarded as one of the most considerable and most lucrative as by their situation on the mediterranean, and the imperfect state of navigation, they could not attempt to open a direct communication with India by sea: the enterprising spirit of commerce prompted them to west from the Idumacans some commodious harbours towards the bottom of the Arabian Gulf. From these they held a regular intercourse with India on

[1] *cf.* W. Robertson *"Disquisition"* p.9-10.

[2] I. Lenorment and E. Chevallier, "*Ancient History of the East* Vol. I, p. 144.

the one hand, and with the eastern and southern coasts of Africa on the other. The distance, however, from the Arabian Gulf to Zyre, was considerable, and rendered the conveyance of goods to it by land carriages so heavious and extensive that it became necessary for them to take possession of Phinocolura, the nearest port in the mediterranean to the Arabian Gulf, thither all the commodities brought from India were conveyed overland by a route much shorter, and more practicable, than that by which the productions of the East were carried at a subs equent period from the opposite shore of the Arabian Gulf to the Nile. At Rhinocolura they were re-shipped, and transported by an Easy navigation to Tyre, and distributed throughout the world. This, as it is the earliest route of communication with India of which we have any authentic discription, had so many advantages over any ever known, before the modern discovery of a new course of navigation to the east, that the Phoenicians could apply other nations with the productions of India in greater abundance and at a cheaper rate, than any people of antiquity."[1] Another evidence supporting the view of Mr. Robertson is to be found in the fact that the Phoenicians introduced their letters in India a direct proof of their intercourse. King Solomon, stimulated or otherwise by the neighbouring Phoenicians, joined hands with Hiram, king of Tyre and built a fleet at Elath and Eziongeher. Manned by Phoenician sailors, it sailed to Qphir and brought back many treasures which two kings shared between themselves. The location of Qphir is another unsettled topic. But for all practical purposes Prof. Lassen had closed the controversy by identifying it with Abhira in the province of Gujrat in India. With the interval of three years, the voyage was repeated and the ships laden with all precious articles to enrich the country so much so that "the king made silver to be in Jerusalem as stones, and cedars made her to be as Sycamore trees that are in the vale for abundance".[2] Thus all the advantages of trade were secured for the people with exposing to the dangers attendant upon it. Consequently in the words of Dean Stanley (Senai and Palestinep. 261) "To describe the capital as a place where shall

[1] W. Robertson "Disquisition" p. 7-8.

[2] I Kings X27.

go no galley with oars, neither shall gallant ship pass by" (Isaiah XXXIII 21) is not, as according to western notions it would be an expression of weakness and danger, but of prosperity and security."

The trade between India and Judea does not date with Soloman : it enjoys considerable antiquity; mentions of Ophir are to be found long before the time of Soloman in the I Chronicles XXIX, 4, I kings XXII 48, and in Isaiah, XIII 12. These Biblical evidences may be supplemented by linguistic evidences such as the Hebrew word *tuki* which is but a little changed form of the poetical word Tokei i.e. the Tamil-malayalam language for peacock or the Hebrew word *Ahalim* or *Aholoth*— 'aloes'—a corruption of the Tamil-malayalam word, *Aghil.*[1]

The rise of Babylonia marks the high water mark in the ancient commercial activity of India. Situated at the confluence of the Euphrates and the Tigris joining the Persian Gulf with the mediterranean and being a meeting place of upper and lower Asia, Babylon was destined to be the great emporium of the eastern and western trade. It was the meeting place of routes from all parts of the ancient world. There is ample evidence, says Mr. Kennedy, that "warrants us in the belief that maritime commerce between India and Babylon flourished in the seventh and sixth and more especially in the sixth century B.C. It was chiefly in the hands of the Dravidians although Aryans also had a share in it, and as Indian traders settled afterwards in Arabia and on the eastern coast of Africa, and as we find them settling at this very time on the coast of China, we cannot doubt that they had their settlements in Babylon also. But the sixth and seventh centuries are the culminating period of Babylonian greatness. Babylon which had been destroyed by Senkacherib and rebuilt by Esarhaddon ; Babylon, which had fused her importance and her fame to the sanctity of her temples now appears before us of a sudden as the greatest commercial mart of the world. There was no limit to her power. She arose and utterly overthrew her ancient rival and oppressor Nineveh. With Nebuchadnezzar she became the

[1] *cf.* E. J. Simcox — *"Primitive Civilizations"* Vol. I, p. 545.

wonder of the world . . . . . But the secret of her greatness lay to her monopoly of the treasures of the east, in the shouting of the Chaldeans in their ships and smartly orientals who frequented her lazars. It moved the envy of the nations. Paharaoh Necho (612-596 B. C.) vainly sacrificed his subjects in order to reopen the canal which Seti I had made from the Nile to the Red Sea : and he despatched his Phoenician fleet round Africa in the hope of discovering a new world for commerce. And a long ago, the rivalry of the Spaniards and the Portuguese for the treasures of India . . . . . was anticipated and equalled by the rivalry of Babylonians and Egyptians . . . . . when the world was as yet one and twenty centuries younger."[1] This commercial intercourse told very decidedly on the literature of India. Sea played an immense role and *'Mokar'* the monster fish was constantly alluded to. The Vedic dieties fall in the back ground and the Hindu mind of the times soared high in inventing fantastic cosmogonies as is to be found in the Vishnu Purana where it is said that "the Supreme Being placed the Earth on the summit of the ocean, where it floats like a mighty vessel and from its expansive surface does not sink beneath the waters." The entire literature smacks of commercialism and is essentially different in nature from the early Vedic literature so much so that Prof. Max Muller in his *"History of Ancient Sanskrit Literature"* says, "there is throughout the Brahmanas, such a complete misunderstanding of the original intention of the Vedic hymns that we can hardly understand how such an estrangement could have taken place unless there had been at some time or other a sudden and violent breaks in the chain of tradition". This "estrangement" can be accounted by foreign influence which follows the footsteps of commerce." The focus of this foreign influence upon India was therefore in the sixth, seventh and eighth centuries" and certainly not "later than the time of Buddha, for this great teacher found all India believing in metempsychosis, which is not a Vedic doctrine" and must therefore be an exotic.[2] It must not however be supposed that the maritime activity of the Hindoos dates from the period : nay sea-farming had become a matter of habit with

[1] J. Kennedy J. R. A. S. 1898, p. 270-1.

* Rev. Joshep Edkins *J. R. A. S. 1886,* p. 6.

them : Buddha in the Kevaddhu Sutta of the Digha (fifth century B.C.) says by way of simile "Long ago ocean going merchants were wont to plunge forth upon the sea, on board a ship, taking with them a shore-sighting bird. When the ship was out of sight of land they would set the shore-sighting bird free. And it would go to the east and to the south and to the west and to the north, and to the intermediate points, and rise aloft. If on the horizon it caught sight of land, thither it would go back to the ship again. Just so, brother etc." Mr. Rhys Davids comments that such a Simitic would scarcely be made use of, in ordinary talk, unless the habit referred to were of some standing and matter of general knowledge."[1]

The decline of Babylon however was as sudden as her rise and dates from the reign of king Darius (579-484 B. C). From the fifth century on, we no longer find the commercial tablets that were so numerous in earlier times. The Persian conquest not only destroyed Babylon but extended to Egypt. The canals build for riverine traffic decayed and the flow of the rivers was impeded by dams : as a result of this the Arabs became the caviers of trade and Yemen interests the splendour of Babylon and Palmyrs The Chaldeans also in spite of the sweeping expeditions of Darius continued their trade by establishing their colonies at Gerrha and other places.

The conquests Darius brought under his rule a vast Empire which bacame contiguous with that of the empire of Alexander. It was quite impossible for the two emperors full of earth hunger remain as goodly neighbours, friction was bound to arise and Alexander waiting for an opportunity set out on his career of conquest. In one sweep he destroyed the empire of Darius and extended his dominion over Egypt, Central Asia and the northern part of India.

The motives of Alexander's gigantic expedition are a matter of conjecture. Vindication for humiliation suffered at the hands of Darius has been put forth as one of them. Prof. Lassen, however radically enough, ventures to say that greed of gold was the object of Alexander's expedition and that it was whetted by

[1] *J. R. A. S. 1899,* Vol. 31, p.432

the presence of Indian goods in Greece. The commercial intercourse with Greece as with Judea has left its impress upon the language of the two trading people." Thus the Greek name for rice *(oryza),* ginger *(zingiber),* and cinnamon *(karpion)* have a close correspondence with their Tamil equivalents, viz., *arisi, inchiver,* and *karava* respectively; and this identity of Greek with Tamil words clearly indicates that it was Greek merchants who conveyed these articles and their names to Europe from Tamil land. Again, the name *Yavan,* the name by which these Western merchants were known, which in old Sanskrit poetry is invariable used to denote the Greeks, is derived from the Greek word *Jaonis,* the name of the Greeks in their own language." [1] Another word that may be added to this group of words having a common origin is the parrell words for ivory or elephant in Greek "*Elephas*" in Egyptian "*Ebu*" and "*Ebha*" in Sanskrit which in the opinion of Prof. Lassen indicate a common Sanskrit origin.

Whatever may have been the motives of Alexander, it is quite certain that having known India intimately, he did conceive the idea of bringing the two countries in close commercial relation. Alexander found that this rich trade of India was monopolized by the Phoenicians of Zyre who supplied the rest of the world with Indian commodities. His envy of the Phoenicians was considerably heightened by his personal knowledge of the prosperity of India. "The country he had hitherto visited, was so populous and well cultivated, or abounded in so many valuable productions of nature and of art, as that part of India through which he had let his army. But when he was informed in every place, and probably with exaggerated description, how much the India was interior to the Ganges, and how far all that he had hitherto beheld was surpassed in the happy regions through which that great river flows, it is not wonderful that his eagerness to view and to take possession of them should have prompted him to assemble his soldiers, and to propose that they should resume their march towards that quarter where wealth, dominion, and fame awaited them."[2] The northern part of India which Alexander subdued was given over by him to Porus, his ally and is said to have

[1] R. K. Mookerji "*Indian Shipping*" p. 121

[2] W. Robertson "Disquisition", p. 16-17.

contained "no fewer than four thousand towns." "Even in the most restricted sense" comments Mr. Robertson "that can be given to the vague indefinite appellations of nations and towns, an idea is conveyed of a very great degree of population. As the fleet (of Alexander) sailed down the river (Indus), the country on each side was found to be in no respect inferior to that of which the government was committed to Porus."[1]

The memoirs or journals of his generals Ptolemy, Aristobulus, and Nearchus opened the knowledge of India to Greece and to Europe. Having conquered Egypt, Alexander thought of opening a direct trade between India and Greece. With this object in view he founded the city of Alexandria after his own name which became the greatest emporium of trade in ancient times and continued to be so in spite of many vissicitudes. He cherished many a dreams of permanently joining India to his empire and some of it, not all of them, would have been realized had he lived longer. Unfortunately he died soon after he established his empire which within a short time crumbled to pieces. The governors of the different provinces parcelled out among themselves the whole empire. Goaded, by ambition, emulation and personal curiosity/animocity they fought among themselves for supremacy. It would be erroneous to suppose that the commercial relation between India and Greece ceased because of the fall of Alexander's empire : just the reverse, the relations became closer. Seleucus, the most enterprising and ambitious general of Alexander, after seizing for himself the Persian empire, sought to join to his dominions the provinces of India conquered by Alexander. Seleucus was alive to the commercial gains to be derived by such a conquest and determined to carry out his plans by means of his vast armies. But his adversary was more than a match for him. Chandragupta (Sandracottus of the Greeks) was ruling India as a benevolent despot, Amidst all medievalism he was a modern man endowed with both brain and brawn. Seleucus realized the superior strength of his enemy and wisely concluded peace and to cultivate friendly relations between the two, he sent Magasthenes as an ambassador to the court of

[1] W. Robertson "*Disquisition*" p. 22.

Chundragupta. Magasthenes was followed by Daimachus to continue the friendly relations. The Greeks maintained their intercourse with India through the Graceo-Bactrian kingdom for a long time though we have very scanty means to judge its magnitude and charter. The Chinese historians tell us "that about one hundred and twenty-six years before the Christain Era, a powerful horde of Tartars, pushed from their native seats on the confines of China, and obliged to move towards the west by the pressure of a more numerous body that rolled on behind them, passed the Taxartes, and pouring in upon Bactria, like an irresistible torrent, overwhelmed that kingdom, and put an end to the dominion of the Greeks there, after it had been established near one hundred and thirty years".[1] Though the land communication was thus interrupted, Alexandria continued to be the emporium of sea trade between Greece and India. Ptolemy, the son of Lagus, during his governorship greatly encouraged the Indian Commerce. His son Ptolemy Philadelphus, in order to carry the articles of India directly to Alexandria started constructing a canal joining the Red Sea and the Nile : the project however was too big and was abandoned. He however built a city on the west coast on the Red Sea and called it Berenice and it continued to be the staple town for Indian trade :

> "But while the monarchs of Egypt and Syria laboured with emulation and ardour to secure to their subjects all the advantages of the Indian trade, a power arose in the west which proved fatal to both. The Romans, by the vigour of their military institutions, and the wisdom of their political conduct, having rendered themselves masters of all Italy and Sicily, soon overturned the rival republic of Carthage ; A. C. 55, subjected Macedonia and Greece, extended their dominion over Syria, and at last turned their victorious arms against Egypt, the only kingdom remaining of those established by the successor of Alexander the Great."

With the subjugation of Egypt the lucrative commerce from India flowed into Rome; but this was not the only way. There was another trade route for the Indian commodities into the west. It was a land route and was intended by Solomon to concentrate the Indian trade in judea. It passed the town of Tadmore or Dalmyra situated midway between the Euphratis and the

[1] W. Robertson "*Disquisition*" p. 37.

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mediterranean. After the subjugation of Syria by Romans, Palmyra became independent and grew to be a populous and flourishing town. It became a distributing centre. But the Roman cupidity knew no bounds. At the slightest sign of ill-feeling on the part of Zenobia, the queen of Palmyra, the Romans took the city and included it within their empire.

But the inclusion of Palmyra was not enough for the Romans to monopolize the Indian trade for, another power equally strong was rising into the east. The Parthians had dominated central Asia and had made the boundaries of their empire contiguous with that of the Romans. The struggle between Parthia and Rome extended from 55 to 20 B. C. but the struggle for supremacy remained indecisive. "The warfare between 55 and 20 B. C. had left the two empires with a wholesome respect for each other: and Augustus left it as a principle of imperial policy that the west bank of the Euphrates was the proper limit for the Roman empire, beyond which the power of Rome could not with advantage be extended".[1] The policy of the Roman Empire during the two centuries following the Christain era was "to encourage direct sea trade with India, cutting out all overland routes through Parthia and thus avoiding the annoyance of fiscal dependence on that consistent enemy of Rome".[2] Under the Pax Romana, trade between India was greatly fostered and grew so much in importance, guides to the ports of the India and itenerary of land travels and caravans were begun to be written for the benefits of the merchants. It was during the middle of the first century A. D. that Hippolus, a Greek Egyptian, discovered the regularity of the Indian monsoon and thus facilitated the voyage of the traders. It was also about this time that a Greek merchant wrote "The Periplus of the Erythrean Sea" or guide to the Indian ocean. It is the most authentic document we have for the study of the Indian commercial activity. Another Greek adventurer, Isodore of Charax travelled round the Parthian kingdom and gave a full account of the Caravan trade along the land route. Before this it had to receive the oriental goods from the hands of the others. The

[1] Isidore of Charax "*Parthian Stations*" ed, W. H. Schoff, p. 21.

[2] *Ibid,* p. 19.

Arabs concealed all information relating to India to perpetuate their monopoly and the Parthian tolls greatly augmented the value of the Indian commodities, "so that all this rich trade that flowed to Rome paid its tolls to the empire of Parthia and to the Arab kingdoms, unless Rome could develop and control a seaborne trade to India".[1] But this discovery of the monsoons by Hippolus, the columbus of modern times fulfilled much felt want of the Romans." Great shiftings of national power followed this entry of the Roman shipping into the Indian ocean. One by one Petia and Gerrha, Palmyra and Parthia itself, their revenues sapped by the diversion of accustomed trade, fell into Roman hands. The Homerite kingdom in South Arabia fell upon hard times, its capital into ruin, and some to its best men northward and as the Ghassanids bowed the neck to Rome, Abyssinia flourished in proportion as its old enemy declined. If this state of things had continued, the whole course of later events might have changed. Islam might never have appeared, and a greater Rome might have left its system of law and government from the Thames to the Ganges. But the logic of history was too strong. Gradually the treasure that fell to the Roman arms was expended in suppressing insurrections in the conquered provinces in civil wars at home, and in a constant drain of specie to the east in the settlement of adverse trade balances; a drain which was very real and menancing to a nation which made no notable advance in production or industry by means of which new wealth could be created."[2]

As regards the Roman trade with India we have a thesaurus of information though by no means unquestionable.

The first kind of evidence is the number of embassies sent to Rome from India and Ceylon.

The first embassy came from Ceylon and is recorded by Pliny. It is impossible to determine its exact date : but certain circumstantial evidences would warrant us in placing somewhere between A. D. 41 and 54. It was sent to Claudis and reached him

[1] *Periplus of the Erythrean Sea ,* W. H. Schoff, p. 5.

[2] Erased.

at a time when more serious events such as the intrigues of Agrippina and Messalina's violent death too much occupied the minds of the Roman historian to make an adequate mention of it. The embassy was sent by Chundra Muka Siwa King of Celyon who ruled from 44 to 52 A. D.[1]

Other embassies soon followed. The second came to Trojan in A. D. 107, third to Antonius Pius A. D. 138, fourth to Julian A. D. 361 and the fifth to Justinian A. D. 530. The natives of Indian make no mention of these embassies. They are recorded by Roman historian and barely so, consequently it is very difficult to infer regarding the object of these embassies. They however serve to demonstrate that intercourse between India and Rome was constant and alive and that "during the reign of Servius, his son Commodus, and the pseudo antonines", when Alexandria and Palmyra were both occupied with commerce and were both prosperous. Roman intercourse with India was at its height. Then Roman literature gave more of its attention to Indian matters and did not, as of old, confine itself to quotation from the historians of Alexander or the narratives of the Seleucidian Ambassadors, but drew its information from other and independent sources.[2]

Other evidences mostly of a literary character strengthen the same conclusion. Dr. Hirth in his "China and the Roman Orient" quotes Sung-Shu, a Chinese historian 500 A.D. writing about the period 420-478 A. D. saying; "As regards Ta-ts'in (Syria) and I'ien Chu (India) far out on the western ocean, we have to say that, although the envoys of the two Han dynasties have experienced the special difficulties of this road. Yet traffic in merchandise has been effected, and the goods have been sent out to the foreign tribes, the force of winds, driving them far away across the waves of the sea. There are lofty ranges of mountains quite different from those we know and a great variety of populous tribes having different names and bearing uncommon designations, they being of a class quite different from our

[1] *cf.J.R.A.S.* 1860 Vol. XVIII, p. 349-50.

[2] *cf J.R.A.S.* Vol. XIX, p. 276.

own. All the precious things of land and water come from them, as well as the gems made of rhinoceros horns and chrysoprase, serpent pearls and asbestos cloth, there being innumerable varieties of these curiosities : and also the doctrine of the abstraction of mind in devotion to the Lord of the world (Buddha)—all this having caused navigation and trade to be extended to these parts."

Another Chinese historian Ma-Touanlin in his Researches into antiquity says "India (A. D. 500-16) carries on a considerable commerce by sea with Ta-Tsin, the Roman empire and the Ansi or ASE".[1]

A writer of considerable acumen makes bold to say after the destruction of Palmyra, direct trade between India and Rome never existed. The Romans, he says, established their trading station at Adule, the chief port of Ethiopia and "though under Constantine there was much economic prosperity, yet the Roman trading activity never extended beyond Adule".

Archaeological discoveries and historical references however point to quite the opposite conclusion. Mr. Vincent Smith remarks; "There is good reason to believe that considerable colonies of Roman subjects engaged in trade were settled in southern India during the first two centuries of our era, and that European soldiers, described as powerful Yavanas, and dumb Mlecchas (barbarians) clad in complete armour, acted as bodyguards to Tamil kings, while the large ships of the Yavanas lay off Muziris (Cranganore) to receive the cargoes of pepper paid for by Roman gold".[2] Not only were there Roman trading colonies but that "Roman soldiers were enlisted in the service of the Pandyas and other Tamil kings".[3] And "during the reign of the Pandya Aryappadai-Kadaretha - Nedunj - Cheliyan, Roman soldiers were

[1] Quote in the *J. R. A. S.* Vol. XIX, p. 307.

[2] *Early History of India,* p. 400-1.

[3] Quoted in Mookerjee's *Indian Shipping,* p. 128.

employed to guard the jobs of the fort of Madura".[1] Numismatic evidences also bear out the intimate commercial relations between India and Rome.

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This intimate commercial intercourse between Rome and India is very readily accounted for by the fact that "from the time of Mark Antony to the time of Justinian i.e. from B. C. 30 to A. D. 550, their political importance as allies against the Parthians and Sassanians, and their commercial importance as controllers of one of the main trade routes between the east and the west, made the friendship of the Kusans or Sakas, who held the Indus Valley and Bactria, a matter of highest importance to Rome"[2]

With this short sketch of the trade relations of India with foreign countries we will now consider the articles of commerce and trade routes and the important ports of India.

The Periplus, Ptolemy's Geography and the Christain Topography are the chief sources that furnish with information on the articles of commerce and the ports of India.

The Periplus mentions the following as articles of export:

(1) Spikenard, (2) Cortus, (3) Bdellium, (4) Ivory, (5) Qugate, (6) Lycirem, (7) Cotton cloth of all kinds, (8) Silk cloth, (9) Mallow-cloth, (10) Yarn, (11) Long pepper, (12) Diamonds, (13) Sapphiris, (14) Tortoise shell, (15) Transperent stones of all kinds, (16) Pearls, . (17) Malabathrum,(18) Incense, (19) Indigo.

Under imports it mentions: (1) Wine,(2) Copper,(3) Tin,(4) Lead, (5) Coral, (6) Thin clothing and Inferior sorts of all kinds, (7) Sweet clover, (8) Flint and crude glass, (9) Antimony, (10) Gold and Silver coins accruing from the favourable balance of trade.

The Periplus or the marine guide book to the Indian ocean mentions the following trading ports of India :

(1) Barygaza or the modern Baroach the principle trading centre of western India. It mentions two inland towns connected with Baroach, Paithan and Tagara.

(2) Souppara—modern Supara near Bassein.

(3) Kalliean—the present Kalyan.

(4) Semulla—presumably modern Chembur.

[1] Quoted *Ibid,* p. 128.

* Quoted in Mukerjee—"*Indian Shpping*", p. 139.

(5) Mandagora.

(6) Palaipatami.

(7) Melizeigara.

(8) Tyndis.

(9) Muziris.

(10) Nelkynda.

"Ptolemy's Geography" describes the whole sea coast from the mouths of the Indus to those of the Ganges, and mentions many towns and ports of commercial importance. These are, among others, Syrastra (Surat), Monoglosson (Mangrol) in Guzerat, Ariake (Maharashtra), Soupara, Muziris, Bakarei, Maisoli (Maslipatnam), Kounagara (Konarak), and other places".[1]

Certain of the Tamil poets have beautifully described some of the commercial ports and towns in southern India. One of them says, "The thriving town of Muchiri, where the beautiful large ships of the Yavans, bringing gold, come splashing the white foam on the waters of the Periplus which belongs to the Cherala, and return laden with pepper." "Fish is bartered for paddy, which is brought in baskets to the houses," says another. "Sacks of pepper are brought from the houses to the market: the gold received from ships, in exchange for articles sold, is brought to shore in barges at Muchiri, where the music of the Surging sea never ceases, and where Kudduvan (the Chera king) presents to visitors the rare products of the seas and mountains."[2] The description given of Kaviripaddinam (the Kamara of the Periplus and Khaberis of Ptolemy) or Pukar are equally important and inspiring. It was built on the northern bank of the Kaveri river; then a broad and deep stream in which heavily laden ships entered from the sea without slacking sail. The town was divided into two parts, one of which, Maruvar-Pakkam, adjoined the sea coast. Near the beach in Maruvar-Pakkam were raised platforms and godowns and warehouses where the foods landed from ships were stored. Here the goods were stamped with the Tiger stamps (the emblem of the Chola kings) after payment of customs duty, and passed on to merchants' warehouses. Close by were the settlements of the

[1] R. K. Mookerjce *"Indian Shipping",* p. 134.

[2] Quoted in *Ibid,* p. 135.

Yavana (foreign) merchants, where many articles were always exposed for sale. Here were also the headquarters of the foreign traders who had come from beyond the seas and who spoke various tongues. Vendors of fragrant pastes and powders, of flowers and incense, tailors who worked on silk, wool, or cotton, traders in sandal, aghil, coral, pearl, gold, and precious stones, grain merchants, washermen, dealers in fish baits, butchers, blacksmiths, braziers, carpenters, copper smiths, painters, sculptors, goldsmiths cobblers, and toy-makers all had their habitation in Maravar-Pakkam."[1]

The trade routes from India to the west may be conveniently divided under two heads. (1) The land routes and (2) The marine route.

It is truely said that individual migration is a habit of civilized man. Ancient folks, because of their strong gregarious instinct or because of the want of security, always moved in bands. This habit of theirs is well depicted in their methods of trade. Compelled to be peddlars, fear of competition was never too strong to break the tradings. Caravan which moved from place to place with their loaded animals under conditions so unfavourable that easygoing modern man with all the keen business instinct in him will rather quit worshipping the mamon rather than undergo the difficulties ill-compensated by gain. Speaking of the Caravan Mr. Harbur says, "The very course of the Caravan was not a matter of free choice, but of established custom. In the vast steppes of sandy deserts, which they had to traverse, nature had sparing allotted to the traveller a few scattered places of rest, where, under the shade of palm trees, and beside the cool fountains at their feet, the merchant and the beast of burden might enjoy the refreshment rendered necessary by so much suffering. Such places of repose became centreparts of commerce, and not unfrequently the sites of temples and sancturies, under the protection of which the marchants prosecuted his trade, and to which the pilgrim resorted."[2] Being subject to these conditions the Caravan route was never a straight one, it was always zigzag and when we look

[1] Mookerjee R. K. "*Indian Shipping*", p. 135-136.

[2] Quoted in *the Calcutta Review*, Vol. 19, p. 345 .

at maps of ancient trade we are struck with a network of small roads meeting and crossing each other at various points. However we may decipher two main trade routes from India to the mediterranean. The northern most followed the river Oxus and encircling the northern basin of the Caspian sea converged on the Black sea and thence to Constantinople. The middle one rather followed a straight path, with many bifurcations which meet at market. It starts on along the southern basin of the Caspian Sea through, Tebriz, Erzewm Trebizond and through the Black Sea to Constantinople. These were the two main land trade routes between the India and the west.

There were also two marine routes though one of them was only halfway marine. Of these one was the Red Sea route. Ships from Indian ports crossed the Indian ocean either to southern Africa or sailed upwards, and touched at the ports of southern Arabia and Aden and through the *St. of Babel-mandeb* (the gate of Tears) ploughed the waters of the Red Sea, touching at Jedda on the Arabian coast and Bernice on the Egyption coast. From Bernice goods were taken by Caravan to Thebes and Kos where they were gained through the Nile to Alexandria and from thence to Europe. The other marine route lay through the Persian gulf. Ships sailed from Baroach and kept hugging close to the land and touched at Masket and at Ormuz through the gulf of Oman to Bassora. From Bassora at the mouth of the Persian gulf, the goods were taken by the Caravan along the shores of the Euphrates and Tygris through Babylonia to Antioch on the mediterranean.

These two marine trade routes continued upto the present time but the story of the land trade routes is entirely different. They were closed and were closed for ever and the history of their foreclosure is perhaps the only event in the Asiatic continent that profoundly affected the history of Europe.

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CHAPTER II

COMMERCIAL RELATIONS OF INDIA IN THE MIDDLE AGES

OR

THE RISE OF ISLAM AND THE EXPANSION OF WESTERN EUROPE

The birth of Islam is synchronous with the consolidation of Papal power in Rome under Gregory the Great. It was the era of theocracies and the east was once more spreading a wave of religion that had almost succeeded in Mohomedanizing the entire continent of Europe. Not to speak of Africa and Asia and like many big things ; it had its origin in the small.

Long before Muhamad's birth, Arabia was inhabited by different tribes and enjoyed the prosperity of being the commercial go-between between the East and the West. This early prosperity of the Arabs is attested to by the ruins of rich and splendid cities lined from Petra to Damascus; but according to Strabo, this source of prosperity to the Arabs early dried up when the Romans opened direct trade to India. The products of India and Arabia passed to Myos Hormos on the western shore of the Red Sea and camels to Thebes and thence sailed down to Alexandria through the Nile. As a result of this, the Arabs were reduced to be "the true sons of the desert".

Economically there is no country so poor as Arabia. Arabia, the sandy, stony and happy as Gibbon calls it. Owing to the scarcity of arable land and water, the Arabs could not become a settled people. They continued to be nomads and tribal, having no unity in religion or politics. Owing to their disunion, the Arabs were overrun by foreign invaders many a time. The Abyssinians, the Persians, the Sultans of Egypt and the Turks, all in their turn subjugated the kingdom of Yemen, many a Sythian tyrrant had demanded the allegiance of the holy cities of Mecca and Medina and Arabia in part became the province of the Roman empire.

None was able to subdue the Arabs permanently and they have overthrown the suzereinty of powerful monarchs like Sesostris, Cyres, Pompey and Trojan. The causes of this apparent spirit of independence among the Arabs are to be sought in the geography of their habitat.

Crude and inartistic as was the paganism of the Arabs ritual pomp, elaborate mythology or high philosophical speculation had no place in it. "The Religion of the Arabs, as well as of the Indians consisted in the worship of the Sun, the Moon, and the fixed stars."[1] "Each tribe, each family, each independent warrior, created and changed the rites and the object of his fantastic worship; but the nation, in every age, has bowed to the religion as well as to the language of Mecca."[2] The conversion of pagan to a new religion is never a hard task, for, pagans are anything but fanatic and most tolerant. The pagan Arabs were living in peaceful relations with the Christain communities in the North and at Najran in the South, with the Jewish communities residing in the North-east and the Zorastrians living in close proximity to the Persian Gulf. As a result of this propinquity, the interchange of ideas had been working towards a spiritual monotheism among the Arabs long before the birth of Muhamad and is typified by the Hanifs.

Independently or otherwise of the Hanafi movement, Muhamad, an Arab camel driver, conceived the idea of improving the lot of the degraded Arabs constantly fighting among themselves and offering human sacrifices to the numerous idols in Caaba. No man ever arrogated to himself the virtue of being a Prophet with so little equipment, but he made bold and the faith which, under the name of Islam, he preached to his family and nation is compounded of an eternal truth and a necessary fiction. "*That there is only one God, and that Mahomet is the apostle of God.*"[3] The circumstances of Muhamed's birth are seemingly favourable to his proclamation as a Prophet. It will be remembered that Arabia was populated by various tribes all enjoying equal independence. All these tribe however united to respect the tribe of Koresh which by means, fair or foul, held the custody of the temple of Caaba and the Sacerdotal

[1] Gibbon's "*Decline and Fall of the Roman Empire*", Vol. V, p. 327.

[2] *Ibid.* Vol. V, p. 327-8.

[3] *Ibid,* Vol. V, p. 337.

office of worshipping Caaba had fallen on the family of the Hashemites, chiefly on the grandfather of Mahomed. Taking advantage of his exalted position among the Arabs, Mohomed commenced the preaching of the monotheistic Gospel. There isn't anything new in the Gospel of Mohomed who is the least original of the Prophet. His Koran is a compromise between Judaeism and Christianity. Whatever may be the value of his teachings, the Arabs looked upon it with the utmost hostility, so much so that the Hashemites were lowered in the estimation of their people. The stubbornness of the Arabs grew with the missionary zeal of Mahomed as that of the Hindoos today with the growth of the missionary propaganda. Becoming impatient, the Arabs compelled the Hashemites to expell Mohamed whose very life was near being threatened; Mahomed centred his attention on Medina but was not sure of welcome. He therefore negotiated with the Medinites through the few desciples he had made in Mecca. After being assured of their kindness, he stationed himself at Medina and saved his cherished and young religion from utter ruin, which would certainly "have perished in its craddle, had not Medina embraced with faith and reverence the holy outcasts of Mecca."[1] His stationing at Medina was of immense advantage to Mohamed. To his sacerdotal office was combined the regal and to the judicial, the executive. He became a missionary monarch strong enough to back his preaching by the cannon. "The choice of an independent people had exalted the fugitive of Mecca to the rank of a sovereign and he was invested with the just prerogative of forming alliances and of waging offensive and defensive wars. The imperfection of human rights was supplied and armed by the plentitude of divine power. The Prophet of Medina assured, in his new revelations, a fiercer and more sanguinary tone, which proves that his former moderation was the effect of weakness. The means of persuation had been tried, the season of forbearance was elapsed, and he was now commanded to propagate his religion by the sword, to destroy the monuments of idolatory, and without regarding the sanctity of days, or months, to pursue the unbelieving nations of the Earth."[2] So stationed, he began the expansion of his

[1] Gibbon's "*Decline and fall of the Roman Empire,*" Vol. V, p. 356.

[2] *Ibid*. Vol. V. p.359

creed and kingdom, first by subjugating the Koreish of Mecca. The Arabs were both merchants and robbers in one, and the disciple of Muhamed at Medina began to harrass the trade of the Koreish passing through Medina. The Koreish, being exasperated at this, began warring against Medina. Muhamed, for a while, was on the defensive but he soon got on the offensive and subjugated the city of his birth. Thus he augmented both his forces and resources. "The fair option of friendship, or submission, or battle, was proposed to the enemies of Mahomet. If they professed the creed of Islam, they were admitted to all the temporal and spiritual benefits of his primitive disciples, and marched under the same banner to extend the religion which they had embraced."[2] Having thus equipped his followers for a career of conquest, Mohamed left his mission to his successors, the Califs. "The heroic courage of Ali, the consumate prudence of Moawiyah, excited the emulation of their subjects, and the talents which had been exercised in the schools of civil discord were more usefully applied to propagate the faith and dominion of the Prophet. In the sloth and vanity of the palace of Damascus, the succeeding princes of the house of Ommiyah were alike, destitute of the qualifications of statesmen and of saints. Yet the spoils of the unknown nations were continually laid at the foot of their throne, and the uniform ascent of the Arabian greatness must be ascribed to the spirit of the nation rather than the abilities of their chiefs. A large deduction must be allowed for the weakness of their enemies. The birth of Mahomet was fortunately placed in the most degenerate and disorderly period of the Persians, the Romans, and the barbarians of Europe. The empire of Trojan, or even of Constantine or Charlemagne, would have repelled the attack of the naked Saracens, and the torrent of fanaticism might have been obscurely lost in the sands of Arabia."[3] "With the same vigour and success they invaded the successors of Augustus and those of Artaxerxtus : and the rival monarchies at the same instant became. The prey of an enemy whom they had been so long accustomed to despise. In the ten years of the administration of Omar, the Saracens reduced to his obedience thirty-six thousand

[1] Gibbon's *"Decline and fall of the Roman Empire,"* Vol. V, p. 359.

[2] *Ibid,* Vol. V, p. 400-1.

cities or castles, destroyed fourteen thousand churches or temples of the unbelievers, and edified fourteen thousand mosques for the exercise of the religion of Mahomet. One hundred years after his flight in Mecca, the arms and the reign of his successors extended from India to the Atlantic ocean, over the various and distant provinces which may be comprised under the names of (1) Persia, (2) Syria, (3) Egypt, (4) Africa, (5) Spain."[1] In this great Mahomedan empire, "We should vainly seek the indissoluble union and easy obedience that pervaded the government of Augustus and the Antonines; but the progress of the Mahomedan religion diffused over this ample space, a general resemblance of manners and opinions. The language and laws of the Koran were studied with equal devotion at Samarkand and Seville. The Moor and the Indian embraced as countrymen and brothers in the pilgrimage of Mecca; and the Arabian language was adopted as the popular idiom in all the provinces to the westward of the Tigris."[2]

The entire trade of history has been to account for his Saracen expansion purely and simply by Religion; but an economic interpretation of this same phenomenon may also stand the test. A well-known writer says "The sudden surging forward of the Arabs was only apparently sudden. For centuries previously, the Arab migration had been in preparation. It was the last great Semitic migration connected with the Economical decline of Arabia. . . . . In short, long before Mahomet, Arabia was in a state of unrest, and a slow, uncontrolled infilteration of Arabian tribes and tribal branches had permeated the adjoining civilized lands in Persian as also in the Roman territory, where they had met with the descendents of earlier Semitic immigrants to those parts, the Armaneans, who were already long acclamatised there.

Hunger and avarice, not religion, are the impelling forces, but religion supplied the essential unity and central power. The expansion of the Saracens' Religion, both in point of time and in itself, can only be regarded as of minor import and rather as a political necessity. The movement itself had been on foot long before Islam gave it a party cry and an organization."[3]

[1] Gibbon's "*Decline and fall of the Roman Empire,*" Vol. V, p. 401.

[2] *Ibid,* Vol. V, p. 493.

[3] *Cambridge Medieaval History,* Vol. II, p. 331-2.

Prompted both by the ardour of spreading a new religion and also by the economic forces of the time, within forty-six years after Mahomet's flight from Mecca, the new converts to Muhamedanism appeared in arms before the walls of Constantinople and beseiged it (in A. D. *668-675*). The seige lasted for 7 years without any decisive result, the beseigers made light of the strength and resources of Constantinople. The Romans rose equal to the danger of their religion and empire and met the onrushing Saracens with numbers and descipline with so much heroism that it revived their population in the East and the West and for a while, eclipsed the triumphs of the Saracens, who, had they succeeded in capturing Constantinople, would certainly have jeopardised the prospects of Christianity.

The Saracens invaded Constantinople a second time and beseiged it (A. D. 716-718) but with the same result.

Amidst all these triumphs, the Arabs were being gradually eclipsed by the Seljuks. At the time of their rise, the authority of Quaim, the Abbaside Caliph of Baghdad, was completely overshadowed, first by the Sheite dynasty of the Buyids, and afterwards by the more formidable Fatimite rivals. Placed in such circumstances, the Abbaside Caliph welcomed the rise of the Seljuk Turks, who being the upholders of orthodox Islam were sure to reinvest him all his former power and grandeur. "It is their merit from a Mhommedan point of view to have re-established the power of orthodox Islam and delivered the Moslem world from the subversive influence of the ultra-Sheite tenets, which constitued a serious danger to the duration of Islam itself. Neither had civilization anything to fear from them, since they represented a strong neutral power which made the intimate union of Persian and Arabian elements possible, almost at the expense of the national-Turkish-literary monuments in that language being during the whole period of the Seljuk rule exceedingly rare."[1] The Seljuks comprised innumerable tribes or families, one of which was known as the Guzz. Among these constantly contending parties, the Guzz family, not in good graces of the rest, rose to power and became a menace to the neighbouring Mohomedan provinces.

[1] Enc. Brit. 11th Ed. Art - "Seljuks".

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Under the leadership of Pigu Arstan Israil, they crossed the Oxus and spread over the Eastern provinces of Persia and having defeated Mahamud, the Gaznavite king in the battle of Mero in 1040, they proclaimed their independence. Within a very short time, the Seljuks secured pre-eminance in the whole of central Asia as far as the Hellespont. "After the great victory of Alp Arsla in which the Greek emperor was taken prisoner (1071), Asia minor lay open to the inroads of the Turks. Hence it was easy for Suleiman, the son of Kutulmish, the son of Arstan Pigu (Israil), to penetrate as far as the Hellespont, the more so after the captivity of Romanas' two rivals, Nicephorus Bryennius in Asia and Nicephorus Botanciates in Europe, disputed the throne with one another. The former appealed to Suleiman for assistance, and was by his aid brought to Constantinople and seated on the imperial throne."[1] Within a short time they captured Anttioch to give permanance to their Syrian monarchy and brilliantly carried their arms to such an extent by 1234 that the Seljukian empire included almost the whole of Asia minor.

But the Seljukian empire was bound to be short-lived, both because of internal dissensions and external aggressions. The external aggression of the Seljukian empire was headed by the Mongols. The early history of the Mongols is enveloped by obscurity and legend. Chengizkhan, the hero of the Mongols, at his death in the valley of Kilien in 1227 "left to his sons an empire which stretched from the China sea to the banks of the Dnieper."[2] Chengizkhan appointed Ogdai as the Khakan or his successor and gave parts of his extensive dominion to other claimants. Ogdai tried to extend his dominion. "At the head of a large army, he marched southwards into China to complete the ruin of the Kiu dynasty, which had already been so rudely shaken, while at the same time Tuli advanced into the province of Honan from the side of Shensi. Against this combined attack, the Kiu troops made a vigourous stand, but the skill and courage of the Mongols bore down every opposition and over a hecatomb of slaughtered foes, they captured Kai-Feng-Fu, the capital of their enemies. From the Kai-Feng-Fu the emperor fled to Juning Fu, whither the

[1] Enc. Brita. II Ed, Art - "Seljuks".

[2] Enc. Brita. 11th Ed., Vol. XVIII, p. 712 "Mongols".

Mongols quickly followed. After sustaining a seige for some weeks, enduring all the horrors of starvation, the garrison submitted to the Mongols and at the same time the Emperor committed suicide by hanging."[1] Not being satisfied with this, Ogadi in 1235 A. D. sent an army against the Sung Dynasty of China, south of the Yang-se-kiang and in Korea.

Having thus consumated his conquest in eastern Asia, Ogadi turned his attention to western Asia. In 1236 A. D. he invaded Georgia and Great Armenia capturing Tiflis and Kars and sent a large army under Batu his nephew in eastern Europe. Batu captured Bolgari, the capital city of the Bulgar, crossd the Volga and invaded Ryazan which fell on the 21st of December 1237 and perpetrated such atrocities that "no eye remained open to weep for the dead." He carried Moscow which were followed by Vladimir and Kozelsk. Poland and Hungary were overtaken by the same fate.

Contemporaneous with the rise of the Mongols the Turks known as Ottomans were rising in power. They were one of those nomad tribes dwelling between the plains of Sungaria and the desert of Gobi. "Legend assigns to Oghuz, son of Kara Khan, the honour of being the father of the Ottoman Turks. Their first appearance in history dates from A. D. 1227. In that year a horde, variously estimated at from two to four thousand souls, with their flocks and their Slaves driven originally from their central Asian homes by the pressure of Mongol invasion, and who had sought in vain a refuge with the Seljukian. Sultan Ala-ud-din Kaikobad of Konia, were returning under their chief Suleiman Sha to their native land. They were crossing the Euphrates, not far from the castle of Jaber, when the drowning of their leader by accident threw confusion into their ranks. Those who had not yet crossed the river refused, in face of this omen, to follow their brethren. The little band numbering 400 warriors .... decided to remain under Ertoghrul, son of the drowned leader. Ertoghrul first camped at Jessin, East of Erzerum. A second appeal to Ala-ud-din was more successful and the numbers of the immigrants had become too insignificant for their presence to be a source of

[1] Enc. Brita. 11th Ed., Vol. XVIII, p. 712 "Mongols".

danger. The lands of Karajabagh, near Angora, were assigned to the new settlers, who found there good pasturage and winter quarters. The help afforded by Ertoghrul to the Seljukian monarch on a critical occasion led to the addition of Sugut to his fief, with which he was now formally invested. Here Ertoghrul died in 1288 at the age of ninety, being succeded in the leadership of the tribe by his son Osman. When exhausted by the onslaughts of Ghazan Mahmud Khan, ruler of Tabriz, and one of Chengiz Khan's lieutenants, the Seljukian empire was at the point of dissolution, most of its feudatory vassals helped rather than hindered its downfall in the hope of retaining their fiefs as independent sovereigns. But Osman remained firm in his allegience, and by repeated victories over the Greeks revived the drooping glories of his suzerain. His earliest conquest was Karoja Hissar (1295), where first the name of Osman was substituted for that of the sultan in the weekly prayer. In that year Ala-ud-din Kaikobad II conferred on him the proprietorship of the lands he had thus conquered by the sword and presented him at the same time with the horse-tail, drum and banner which constituted the insignia of independent command. Osman continued his victorious career against the Greeks, and by his valour and also through allying himself with Kensee Mikhal, lord of Harman Kaya, became master of Aineqeul, Bilejik and Yar Hissar ... In 1300 the Seljuk empire crumbled away, and many small states arose on its ruins. It was only after the death of his protector and benefactor Sultaa Ala-ud-din II that Osman declared his independence, and accordingly the Turkish historian dates the foundation of the Ottoman empire from this event."[1] The empire of the Turks was very extensive. " Turks ruled in Asia minor, Turks governed Egypt, Turks held minor authority under the Mongols in Syria and Mesopotamia, while the descendents of Chengizkhan had succeeded to the dominion of the Kalifs; in Persia, had assumed all the dignity of sovereignty in the wild region of the Volga and the Ural mountains, in the lands of the Oxus, and the deserts of Tartary, had spread across central Asia and had founded an empire in China, and were preparing to establish the long line of Mongol emperors in Hindustan whom we know by the name of the Great Moguls."[2]

[1] Enc. Brit 11th Ed., Vol. XXVII, p. 441-3.

[2] Stanley Lane-Poole—"Turkey" (New York, 1899), p. 7.

But the power of the Turks for a time suffered a blow that seemed to end it once for all. "Just at the moment when the Sultan seemed to have attained the pinnacle of his ambition, when his authority was unquestioningly obeyed over the greater part of the Byzantine empire in Europe and Asia, when the Christain states were regarding him with terror as the scourge of the world, another and a greater scourge came to quell him, and at one stroke all the vast fabric of empire which Bayezid had so triumphantly erected was shattered to the ground and this terrible conqueror was Timur, the Tartar or as we call him "Tamurlane". He established his superiority over the petty chiefs that had arisen out of the ruins of the vast kingdom of Chengizkhan. Tamurlane carried every thing at the point of sword and subdued every province that was under Bayezid. The Tartar and the Turk faced in 1402. As the Turks were engaged in laying seige to Constantinople, the Sultan heard of the news of the victory of Tamurlane over his troops at Siwas. Bayezid collected his troops and hurried to give battle in person but lost it at Angora and the edifice of the Turkish empire crumbled to pieces."[1] Reared with consummate skill and maintained with the utmost bravery the Turkish empire succumbed before the "Asiatic Despot", the embodiment of "the wrath of God". "The history of the Ottomans seemed to have suddenly come to an end. Seldom has the world seen so complete, so terrible, a catestrophe as the fall of Bayezid from the summit of the power to the shame of a chained captive."[2]

Unfortunately however Tamurlane did not survive to avail the fruits of his victory and his apparent stroke was far from being a final blow to the Ottoman empire. Mr. Lane Poole says "The most astonishing characteristic of the rule of the Turks is its vitality. Again and again its doom has been pronounced by wise prophets, and still it survives. Province after province has been cut off the empire, yet still the Sultan sits supreme over wide dominions, is revered or feared by subjects of many races. Considering how little of the great qualities of the ruler the Turk has often possessed, how little trouble he has taken to conciliate the subjects whom his sword has subdued, it is amazing

[1] Stanley Lane- Poole— "Turkey" (New York, 1899) p. 7.

[2] *Ibid.,* p. 73.

how firm has been his authority, how unshaken his power, . . Within a dozen years the lost provinces were reunited under the strong and able rule of Mahammud I, and the Ottoman Empire far from being weakened by the apparently crushing blow it had received in 1402, rose stronger and more vigourous after his fall, and like a giant refreshed, prepared for new and bolder feats of conquest."[1] Cheered up by brilliant prospects Mohammed transferred his capital from Brusa in Asia to Adrianople in Europe. The Seljuk Turks reached the Hellespont but it was left to the Ottomans to cross it. Constantinople was the dream of many a Turkish ruler. They had longed for the possession of that imperial city ever since Ottoman had dreamed that he grasped it in his hand. "Thunderbolt Bayezid had besiged it. Musa had pressed it hard. Murad II had patiently planned its conquest. There was little to be won beside the city itself, for all the province round about it had long been subdued by the Ottomans, but the wealth and beauty and the strength and position, of the capital itself were quite enough to make its capture the crowning ambition of the Turks."[2] With eagerness Mahammud II the sixth of the Ottoman emperors was in watchful waiting for pretext to capture the city. Taking advantage of the hostility of the emperor he prepared to attack the city which fell on the 29th of May 1453. The withstanding of the city for such a long time rather than its fall constitute real wonder for "at this period the state of the Byzantine empire was such as to render its powers of resistance insignificant, indeed the length of time during which it held out against the Turks is to be attributed rather to the lack of efficacious means at the disposal of its assailants than to any qualities possessed by its defenders."[3] There is perhaps no place in the world more strategic than Constantinople in that it commands the three continents Asia, Europe and Africa, and whoever has had it, has enjoyed supremacy in all these three. Speaking of the physical strength of Constantinople and the attacks it has withstood Dr. Cunningham says, "As each century came, a new horde of invaders appeared. In the fourth

[1] Stanley Lane- Poole— "Turkey", pp. 74-75.

[2] *Ibid, p.* 107-108.

* Enc. Brit. Vol. XXVII, p. 443.

century, immediately after its foundation, it was threatened by the Goths ; in the fifth, by Huns and Vandals ; in the sixth, by Slavs ; these were succeeded by Arabs and Persians in the seventh, and Magyars, Bulgars and Russians in the eighth and ninth. Even after its prestige had been broken by the success of Venice and the Fourth Crusade, and the establishment of a Latin Kingdom, the restored empire was able to maintain a long resistance against the Turks. It had often been shaken, but not till 1453 did it utterly succumb."[1]

It was a great fortune that this imperial city should have withstood these incessant attacks and should have conserved the wreck of the classical civilization. It was also a great fortune for the propagation of Christanity that the wave of Mohomedanism should have been checked long enough before Christainity to have become a real force in Europe. It bore the brunt of barbarism allowed the classic civilization to develop itself. What Constantinople did on the eastern side Tours did on the western side at a very early date, though not perhaps so brilliantly. Being disappointed in their attempt to take Constantinople the Arabs long before the Turks succeeded in taking it, deployed to the South and carrying their religion triumphantly through Africa thought of entering Europe from the western side through Gibralter. Here in their preliminary advance they met with little opposition for the kingdom of the West, Goths could hardly defend itself against their masterful onrush and by 711 A. D. Spain fell into the hands of the Arabs and the Babers and was flooded with Moorish immigrants. Encouraged by success the Arabs thought of crossing over into Gaul but were held in check by the Duke of Aquilaine who however was defeated near Bordeaux in 732. With redoubled energy they advanced to Poiturs and marched for Tours. But here they dashed against a stronger enemy. The Franks under Charles, the Hammer (Mortel) defeated the Arabs at Tours and thus permanently stayed their advance. The Arabs never more made any attempts to cross the Pyrenees. What would have been the fate of European civilization had the Arabs succeeded in subjugating it, is hard to speculate. This much is certain that the Moors were far in

[1] W. Cunnigham. "Western Civilization—Ancient Times", p. 197-198.

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advance of the Franks. Prof. Robinson says, "Historians commonly regard it as a matter of great good luck that Charles, the Hammer and his barbarus soldiers succeeded in defeating and driving back the Mohomedans at Tours. But had they been permitted to settle in Southern France they might have developed science and art more repidly than did the Franks."

While these rapid movements of the Asiatic nomads were upsettling all peaceful activities in central Asia the Roman empire was fast crumbling into decay and Europe fell back into a dull lull broken only by the incessant warfare of the Germanic people.

Under these circumstances commerce was bound to decline. There were innumerable hindrances to medieaval commerce. Rapidity of exchange was greatly hindered by the lack of money all throughout western Europe. Christianity was anything but an optimistic religion, it was a protest against the comforts of life. Economics was held down by religion. The doctrine of "just price" and the prohibition of whole sale trade greatly depressed commerce. The greatest hindrance that was put in the way of commercial activity was the Christain doctrine of usuary. In one sweep the entire mass of people was prohibited to loan money at interest. When combined with the scarcity of money we can realize the retrograding character of this prohibition. The Jews not being within the pale of Christianity were the only people left to deal in monetory transaction and their service to economics is immeasurable. "This ill-starred people played a most important part in the Economic development of Europe, but they were terribly maltreated by the Christians, who held them guilty of the supreme crime of putting Christ to death."[2] Added to all these were the annoying transit duties arbitrary in their character. The geographic knowledge of the time was bewilderingly miserable. Dangers of the sea were by no means small and the pirates were the source of constant dread. To crown all the most effective hindrance was the dilapidation of the Roman roads.

Under the combined force of these unfavourable circumstances there is no wonder that since the fall of the Roman Empire, there prevailed in Western Europe a long lull and a dull monotony of static life.

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[1] Brasely and Robinson—"Outlines of European History" Part I. (N. Y.) 1914, p. 368.

[2] *Ibid.,* Part I, p. 506.

Constantinople did not pay much attention to commerce. Its policy was that of extortion. It never cared to achieve to the full the gains due to its situation on the Bosphorus. There was very little trade between the West and Constantinople military operation constituted the only stimulus to trade activities.

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Nay the rule of the Saracens in Syria and Egypt was far more enlightened than that of the contemporary rulers of the Byzantine Empire.

But amidst all this ruin Italy conserved the merchantile and intellectual forces of the middle ages. The 9th century A.D. marks the rise of real merchantile activity in the North-East and South-West of Italy. It was the Era of the rise of the Italian City-Republic and Eastern commerce was the thing upon which they fed themselves fat. Each city-state rose to hold "The Gorgeous East in fee."

First and foremost is Amalfi. It wrested its independence from the Eastern Empire by 820. Her maritime activity grew so rapidly that within 20 years their navy was powerful enough to fight the Saracens in their naval attacks on Rome. Her factories (agencies of modern days) were scattered in Palermo, Syracuse, Messina, Durazzo and Constantinople and her reputation as a commercial state grew so wide-spread that, "The maritime laws of *Tabula Amalfitana* were current among traders on every coast of the Inland Sea and the coinage of the Republic was the chief medium of exchange between Latin Europe and the Levout."[1]

The smallness of the harbour prevented Amalfi from being a great emporium. She therefore had to give way to her rivals. She fell prey to the land powers of the Normans who had subdued Naples, Salerno or Brindisi while the sea power was immeasurably outdone by other and better situated city states.

Venice rose as Amalfi went down. "From the time of Charlemagne the Queen of the Adriatic began to take a place in the politics as well as in the commerce of the Latine world. Its

[1] Reymond Beazlcy—"The Dawn of Modern Geography," Vol. II.

situation had advantages beyond any other harbour town of Italy. Separated from the mainland by the sea and from the open sea by the low fringing walls of its lagoons, surrounded almost entirely by shallows pierced only by a few deep channels, Venice was usually considered by its own citizens, as by foreigners, to be beyond attack. The political troubles of the continent made it a refuge from the time of Attila, and the absence of any maritime rival on the adriatic left open a valuable and extensive field of operations for commerce, for colonization and even for conquest."[1] Her benevolent neutrality and her allegiance to Byzantine greatly augmented her prosperity for on the decline of the Eastern Empire the whole adriatic coast came under her influence and the chief markets of Byzantine coast, Antioch, Inopuestia, Adana, Tarsus, Attalia, Strobilos Chios, Ephisus and Phoeacea Hiraclea and Selymbria, Chrysopolis, Demetrias, Adrianople, Athens, Thebes, Thissalonica, Negropont, Corinth Corfus, Durazzo etc. were opened for Venician trade. Her commercial policy was very farsighted and wise. She laid down the rule "of siding always with the stronger, especially in maritime struggle" and practised it on many an occasion and this by crushing all her enemies and ingratiating herself into the favour of the strong achieved her greatness.

Genoa, another city state came late to share in the oriental trade. 1097 A. D. marks her rise. "The origin of the state as an independent body may be found in a *Campagna* or political association, founded at the very close of the eleventh century, controlled by consuls freely elected and supported by the bishops of the city against secular lords, such as Oberti."[2]

From 1097 to 1122 she secured important trading concessions and established factories both on the Levantine Coast as well as on the African. Her trade extended to Egypt through Alexandria, to Tunis and to the Southern Coast towns of France and Spain.

Origin of Pisa which is similar in nature to that of Genoa dates from 1085. By deeds of arms she succeeded in securing commercial privileges from the Moslems and from the Byzantine

[1] Reymond Beazley—"*The Dawn of Modern Geography*", Vol. II, p. 401.

[2] *Ibid.* Vol. II, p. 419.

Empire. Her commerce was so great that "Western orthodoxy was shocked by the "marine monsters" from the ends of the Earth who thronged the streets of the city ; Pagans, Turks, Libyans, Parthians and Chaldeans defiled the town and blackened (her) walls: here, most of all, was to be seen the triumph of commercialism over all the barriers of Latin exclusiveness over, race, religion and language alike." [1] None of the Republics secured more concessions and privileges than Pisa and her maritime activity though short was brilliant.

The commercial activity of these Republics while in their infancy was greatly fostered by the crusades. We are not at all concerned with the military aspects of the crusades though they were perhaps the greatest of military exploits of the time. The commercial aspect of the crusade is what demands our attention.

The sea had its dangers and fears.[2] Hardly any one tried to take a chance. "In that age it might truely be said that no landman went to sea unless obliged to do so, for a voyage was being in prison with the addition charge of being drowned."[3] The importance of water transportation was however demonstrated to the crusaders by the wearisome experience of the landways used in the first Crusade (1096-99); and the marine transportation was in the hands of these Italian Republics. The Crusaders therefore began to indent more and more upon these republics who fed fat on this growing commerce.

"By serving the cause of Christaindom they (the Republics) served their own. They multiplied, many times over, their carrying trade ; they largely increased their export and import commerce. Above all, they acquired a privileged, a more than half political, position on the coasts of the Levant, as time went on, they became more indispensible to the crusading princes, they were able to dictate their terms more freely until the main burden of the Holy war rested upon them as the chief holders of power."[4] The Crusades seem to have been looked upon with different perspectives. The Catholic Church had a double motive

[1] Reymond Brazley—*The Dawn of Modern Geography,* Vol. II, pp. 427-428.

[2] *cf.* "Nemesis of nations" p. 219-220.

[3] Brasely Vol. II, p. 407.

[4] *Ibid,* Vol. n, p. 407.

which is well manifested in the words of St. Bernard, respecting the soldiers of the 2nd crusades, when he says, "In that countless multitude you will find few except the utterly wicked and impious, the sacrilegious, homicides, and perjurers, whose departure is a double gain. Europe rejoices to lose them and Palestine to gain them: They are useful in both ways, in their absence from here and their presence there."[1] The discontented noble, the restless who was eager to shun reponsibilities and the criminal and the sinful had their points of view of the crusades and the objectives as had the religiously devout and naturally romantic. But "the cunning traders and sea men of the commercial republics looked on the crusaders with very different eyes from the average catholic lords and labourers of the inland districts: they were not without religious enthusiasm but they cultivated it rather as a useful commodity than as an inevitable state of feeling ; and they felt but little of the blind hatred against Islam, and the passionate veneration for the Gospel sites, which sincerely animated the great body of the warriors and pilgrims they conveyed to Palesttine. Merchantile interest was never absent from the minds of those who governed, bought, or sold in Venice and Pisa, in Genoa and Amalfi."[2] The results of the Crusades were contrary to expectation. They achieved what was perhaps never intended by the Crusaders and the gain was by no means small. "The heyday of the crusading power on land was also the heyday of the maritime prosperity of many western cities : and at the conclusion of the religious wars the main results of the struggle was to be found in the expansion of the Christain trade, and in the assimilation of no small part of oriental and moorish civilization. For the meeting of east and west in this tremendous conflict, brought little permanent gain to Europe and the Catholic world, in the political sense : Through the medium of commerce, on the other hand it directed the energies of the Christian nations to their true future. The frontal attack of the crusaders was unsuccessful, but the crusading struggle imported a new culture and material prosperity, an increased knowledge, an immensely extended wealth, a restless but obstinate ambition, whose results were seen in the Renaissance of the

[1]Quoted by Brasely and Robinson in "*Outlines of European History"* Part I, p. 471.

[2]Brasely—Vol. II, p. 408.

the fifteenth and sixteenth century in the great discoveries both of geography and natural science and in the final triumph of European arms and enterprise throughout the world."[1] The above may strike as an exaggerated description of the enduring effects of the Crusades but there is no doubt that they imparted a liberal education to the Europeans and fostered trade by giving a permanent footing to merchants inlands where the dominions of the Christain rulers had been destroyed.

The Italian Republics were immensely rewarded for their help to the Crusaders. Besides many privileges each one acquired "spheres of influence" exclusive of the other anticipating the modern "Spheres of influence" in China. They all rivalled each other for the control of the marts behind the Levants. "The Moselm hinterland to the Crusading Syria possessed four chief markets—Aleppo, Damascus, Hems or Emesa, and Hawath, beyond which lay the still greater marts of Bagdad and the lesser Emporia of Mosul and Bassora or Basra converging the line of the Tigris, Aleppo was a head centre of the trade route from the Abbasside Caliph's 'metropolis' to Antioch and Laodicea on the western side. This route ... Edrisi calls the great avenue of the trade of Irak, Persia and Khorasan, and the silk market of Allepi proved its connection with the still more distant countries of the Far East. Even at the close of the thirteenth century many Venetian traders were residents here for the sake of commerce in *Seric* goods, as well as in *alum*. The figments and the pepper found at Antioch by the Crusaders, on the capture of the city, also bore witness to an Indian commerce with the mediterranean by this path, and the elder Sanuto is probably right when he says (at the beginning of the 14th cen.) That in the old time most Oriental goods passed along this way to the Roman Sea."[2] The rapid movement of troops by Saracens and the Christains did not materially affect the Red sea route to India and Alexandria continued to be the "market of two worlds."

These Italian Republics secured the Oriental commodities and started commerce with "ultra-montane lands in the north of the

[1] Brasely, Vol. II, p. 395.

[2] Brasely Vol. II, p. 441.

continent and became "the European stapes of Mediterranean track." The north was practically in a semi-barbarous condition. The commercial activity in the Baltic was meagre. The Viking was a "half merchant and half pirate". "So far as we can gather... this commercial activity (in the north) was different from that of the Phoenicians and their Greek initators in two important particulars. It was much less completely organized. The Phoenicians had settled factories at special points, and there were permanent off-shoots of the mother-city in distant lands, and had recognised rights and obligations. But the horse commerce does not appear to have arisen between towns and colonies. The Viking was rather the adventurer who went out to improve his fortunes as best he might, and who it be found a favourable opportunity, established himself on an estate. The Horsemen may have had more aptitude for town life than some of the other Teutons, but they were ready to become cultivators and colonists, and did not confine their energies and trade." [1] Nay before their conversion to Christianity, the Horsemen were a great menace to peaceful commerce. Considerably after the conversion of the Horsemen to Christainity signs peaceful commerce began to show among the Flemish towns. This had much to do with the wool productions in England. English was exchanged for Flemish fabrics. The Flemish dealers had organized themselves into what is known as "Flemish House of London" and controlled the trade through the "staple" towns. Beyond Flanders the German trade was controlled by the German House. It was a close confederation of a large number of towns of northern Germany. This German Hanseatic League was the most extended commercial organization of middle ages. It gathered the products of the Baltic lands, such as lumber, tar, salt, iron, silver, salted and smoked fish, furs, ambers and certain coarse manufactures which it exchanged for goods brought by the commercial cities of Italy from far off lands. Thus through the agency of these Italian Republics, "the products of Arabia and Persia, India and the East Indian Islands, and even of China, all through the middle ages, as in antiquity, made their way by long and difficult routes to Western Europe. Silk and Cotton, both raw and manufactured

[1] William Cunningham—"*Western Civilization*" (Modern Times) p. 110.

into fine goods, indigo and other dyestuffs, aromatic woods and gums, narcotics and other drugs, pearls, rubies, diamonds, sapphires, turquoises, and other precious stones, gold and silver, and above all the edible spices, pepper, ginger cinnamon, cloves, and all-spice, could be obtained only in Asia."[1] Thus the commerce between Asia and Europe formed a regular living system and was fed by various channel.

But this system was early disturbed by the rise of Islam. When we imagine that trade was carried on by land Caravans with all the cumbersomeness we can imagine the hinderances it must have underwent owing to the rapid military movements of the Saracens We will recall that there were four principal trade routes from Asia to Europe and they all lay through the dominions of the Saracens. "During the Crusades, so long as the avenue by the Persian Gulf and the Red Sea were controlled by hostile Mohomedan powers, it became necessary to adopt another more expensive and circuitous route, requiring much land-carriage and several transfers of freight. This route led up the Indus, across the mountains on beasts of burden, thence by the Oxus, and so to the Caspian Sea. This, which was ancient route, was now adopted by Venice and Genoa. From the Caspian it took especially the direction of the Volga, to a place called Zarizn, thence through the country to the Don, where, at the river's mouth, in the town of Tana, now Azor, both Venice and Genoa had commercial privileges, and the former had a consul from the end of the 12th century. Afterwards an important entrepot for Genoa was Theodosia, now Jatta, in the Crimea."[2] "Islam had hemmed Christendom on every side. On the East as on the South, the Crescentraised a barrier against the advance of the Cross."[3] But in this mighty struggle of the Cresent and the Cross commerce suffered immensely. "The Ottoman seizure or obstruction of the Indian trade routes brought disaster not alone to the mediterranean republics. The blow fell first on Genoa and Venice, but it sent a shock through the whole system of

[1] Edward Slow P.Cheney : Social and Industrial History of England p. 86.

[2] J. of Am. O.S.

[3] W.M. Cunnigham—"Western Civilization" (Modern Times) p. 130

The original spelling of some words have been retained as they were found in the MS, such as, 'hinderances' 'propogate', 'ninety', 'truely', 'merchantile', etc. The variations in the spellings of the proper nouns used by Dr. Ambedkar are also left untouched

European commerce. The chief channel by which the products of Asia reached the central and northern nations of Christendom was the Hanseatic League."[1] The Hanseatic had profited mainly owing to its control of Oriental wares coming through Italian Republics. From very early times "Germany and the north Italian upland were dependent on the Republic (Venice) for the products of the east, and when 1017 of (*) ships laden with spices suffered shipwreck, the event is noticed by a (*) chronicler as a serious misfortune."[2] "The Indian trade formed an important contributory to this Hanseatic commerce. When the eastern traffic began to dry up, its European emporiums declined."[3] In this blocade of old trade routes lies the (*) expansion of western Europe. The whole situation is well summed up by Prof. A. F. Poland when (*) as to why America was discovered towards the end of the fifteenth century, he says, (*) would be the paradoxical assertion that Columbus discovered America in 1492 or thereabouts because the Turks are an obstructive people. The connection is not quite obvious, but obvious connections are always superficial, and this is more profound. The Germans have a proverb *Dermensch est was arisst*—man is what he eats. It might be (*) for a motto by those people. (This seems to be incomplete—ed.)

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* (Illegible and erased words are left out and space is shown blank in bracked—Ed.)

1. W. W. Hunter, A *History of British India.* Vol. I, p. 52.
2. Breasely, Vol. II, p. 405.
3. W. W. Hunter, op. Cit. Vol. I, p. 53.

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CHAPTER III*

INDIA ON THE EVE OF THE CROWN GOVERNMENT

More than anything else in the world, Imperialism stands in greater need of defence and Imperialists have not been wanting in their duty.

Unlike the Greeks who did not have even a word for imperialism nor knew the idea of the federation of city states, the Romans were the world's first and greatest imperial people and they coined a justification for imperialism that became the heritage of their successor.

They proclaimed that they were a people of superior race with a culture too high to be compared with any other, that they had better system of administration, that they were versed in the arts of life. They also proclaimed that the rest were people of inferior race with a very low culture and were absolutely devoid of the arts of life, and that their administration was very despotic. As a logical consequence of this the Romans argued that it was their divine mission to civilize their low lying brethern, nay to conquer them and superimpose their culture in the name of humanity.

The British have justified their imperial policy in India by similar argumentation. The British historian of India have a kind of Leues Boswelliana—disease of admiration. Their optical vision somehow or other has magnified the vices, not the virtues, of the predecessors of the British in India. Not only have they been loud in their denunciation of the Moghul and the Maratha rulers as despots or brigands, they cast slur on the morale of the entire population and their civilization. This is but natural for individuals as well as states can raise themselves only by lowering the merits of others.

Historians of British India have often committed the fallacy of comparing the Rule of the British with their immediate or remote predecessors. In deference to historical methodology. They

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***** In the MS., this Chapter No. is V. Chapter III and IV are not forthcoming—ed.

ought to compare the rulers of India with the contemporaries in England. Much of historical error will vanish if we closely follow this plan. It would no longer be a matter of contemptuous pity to read perhaps the abject condition of. the Hindoos under the conquest of the Mohommedans when we will remember the pitiful condition of the Anglo-Saxons under their Norman conquerors when "to be called an Englishman was considered as a reproach—when those who were appointed to administer justice were the fountains of all iniquity—when magistrates, whose duty it was to pronounce righteous judgements were the most cruel of all tyrants, and great plunderers than common thieves and robbers .... ; when the great men were inflamed with such a rage of money that they cared not by what means it was acquired ; when the licentiousness was so great that a Princess of Scotland found it necessary to wear a religious habit in order to preserve her person from violation."

The much spoken of Mohomedan cruelty could hardly exceed that committed by the first Crusaders on their conquest of Jerusalem. The garrison of 40,000 men "was put to the sword without distinction ; arms protected not the brave, nor submission the timid; no age or sex received mercy ; infants perished by the same sword that pierced their mothers. The streets of Jerusalem were covered with heaps of slain, and the shrieks of agony and dispair resounded from every house."

If we thus run down through the history of India and history of England and compare contemporary events we will find that for every Native Rowland we have an English Oliver. We must therefore repeat the warning of Sir Thomas Munro to English Historians of India, who said, "When we compare other countries with England, we usually speak of England as she now is, we scarcely ever think of going back beyond the Reformation and we are apt to regard every foreign country as ignorant and uncivilized, whose state of improvement does not in some degree approximate to our own, even though it should be higher than our own as at no distant period."

Let us, therefore, turn to the "Despots and Brigands" who ruled India before the British and let us review their deeds and the condition of the people during their respective rulers

This knowledge is absolutely necessary in order to form a correct estimate of the Economic condition of the people of India under the East India Company.

We need not wait to dilate upon the Economic prosperity of India in ancient times since we have already dwelt upon it.

We have a consensus of opinion both Hindoo and Mohomedan as regards the prosperity of India when the Mohomedan conquest took place. The magnificence of Canouj and the wealth of the Temple of Somnath bear witness to it. It is a mistake to suppose that the Mussalman sovereigns of India were barbarous and despots. On the other hand majority of them were men of extraordinary character. Mohommed of Guzni, "showed so much munificence, to individuals of eminence that his capital exhibited a greater assemblage of literary genius than any other monarch in Asia has ever been able to produce. If rapacious in acquiring wealth, he was unrivalled in the judgement and grandeur with which he knew how to expend it."

Of all his illustrious successors one of whom was a female (Sultana Rezia); Feroz Shah is very well known for his administration. His public works "consisted of 50 dams across rivers to promote irrigation, 40 mosques and 30 colleges, 100 Caravan series, 30 reservoirs, 100 hospitals, 100 public baths, 150 bridges, besides many other edifices for pleasure and ornament; and, above all, the canal from the point in the Jumna where it leaves the mountains of Carnal to Hausi and Hissar, a work which has been partially restored by the British Government. The historian of this monarch expatiates on the happy state of the ryots under his Government, on the goodness of their houses and furniture and the general use of gold and silver ornaments amongst their women... The general state of the country must have been flourishing, for Milo de Conti, an Italian traveller, who visited India about A.D. 1420, speaks highly of what he saw in Guzerat, and found the banks of the Ganges covered with towns amidst beautiful gardens and orchards. He passed four famous cities before he reached Maarazia, which he describes as a powerful city, filled with gold, silver, and precious stones. His accounts are corroborated by those of Barbora and

Bartema, who travelled in the early part of the sixteenth century. The former in particular describes Cambay as a remarkably well-built city, situated in a beautiful country, filled with merchants of all nations, and with artisans and manufacturers like those of Flanders. Caesar Frederic gives a similar account of Guzerat, and Ibne-Batuta, who travelled during the anarchy and oppression of Mohammed Tagluk's reign, in the middle of the fifteenth century, when insurrections were reigning in most parts of the country, enumerates many large and populous towns and cities, and gives a high impression of the state in which the country must have been before it fell into disorder."

Baber, the founder of the Moghul dynasty in India found the country in a prosperous condition and was surprised at the immense population and the innumerable artisans everywhere. He was a benevolent ruler and public works marked his statesmanship. Sher Shah who temporarily wrested the throne from the Moghul was excepting Akabar, the greatest of Mohomedan rulers and like Baber executed many public works.

Akabar's benevolent administration is too well known to need any mention.

The rule of Shah Jehan who "reigned not so much as a king over his subjects, but rather as a father over his family" was marked by the greatest prosperity; his reign was the most tranquil.

Speaking of the condition of the people in the dominions of the Marathas who were contemporaries of the later Moghuls a traveller says, "from Surat, I passed the Ghats, and when I entered the country of the Maharattas, I thought myself in the midst of the simplicity and happiness of the golden age where nature was yet unchanged, and war and misery were unknown. The people were cheerful, vigourous, and in high health, and unbounded hospitality was a universal virtue ; every door was open, and friends, neighbours and strangers, were alike welcome to whatever they found."

With regard to the economic condition of the people in Southern India which was under the rule of Tipoo, a historian

says, "When a person, travelling through a strange country, finds it well cultivated, populous with industrious inhabitants, cities newly founded, commerce extending, towns increasing, and everything flourishing, so as to indicate happiness, he will naturally conclude it to be under a form of Government congenial to the minds of the people. This is a picture of Tipoo's country, and this is our conclusion respecting its Government." "His country was found everywhere full of inhabitants and apparently cultivated to the utmost extent of which the soil was capable" …. His Government though strict and arbitrary, was the despotism of a strict and able sovereign, who nourishes, not oppresses, the subjects who are to be the means of his future aggrandisement, and his cruelties were, in general, inflicted on those who he considered as his enemies.

Clive described Bengal as a country of "inexhaustible riches". Mecaulay said, "In spite of the Mussalman despot and of the Maratha freebooter, Bengal was known through the East as the Garden of Eden—as the rich kingdom. Its population multiplied exceedingly; distant provinces were nourished from the overflowing of its granaries: and the noble ladies of London and Paris were clothed in the delicate produce of its looms."

But with the advent of the English things began to change. Prosperity bade fair to India and perched itself on the Union Jack.

The evil forces were set forth both on the side of the Parliament and the East India Company.

The Rule of the Company was anything but wise, it was rigourous, it gave security but destroyed property. The scheme of administration was far from perfect. Adam Smith characterizes the "Company of Merchants" as "incapable of considering themselves as sovereigns, even after they have become such" and says, "Trade or buying in order to sell again, they will consider as their principal business, and by a strange absurdity, regard the character of the sovereign as but an appendix to that of the merchants,.... as sovereigns, their interest is exactly the same with that of the country which they govern. As merchants, their interest is directly opposite to that interest." [1] Adam Smiths

1. '*Wealth of Nations*' (Canner's Ed.) Vol. II, p 136-7.

criticism of the Courts of Proprietors and Directors described in the last chapter is also very valuable. He posits that the interest of every proprietor of India stock, is by no means the same with that of the country 'in the Government of which his vote gives him some influence and says, "This would be exactly true if those masters never had any other interest but that which belongs to them as proprietors of India stock. But they frequently have another of much greater importance. Frequently a man of great, sometimes even a man of moderate fortune, is willing to give thirteen or fourteen hundred pounds... merely for the influence which he expects to acquire by a vote in the Court of Proprietors. It gives him a share though not in the plunder, yet in the appointment of the plunderers of India. The Directors, though they make those appointments, being necessarily under the influence of the Court of Proprietors, which not only elects them, but sometimes overrules their appointments. A man of great or even of moderate fortune, provided he can enjoy this influence for a few years, and thereby get a certain number of his friends appointed to Employments in India, frequently cares little about the dividends which he can expect from so small a capital, or even about die improvement or loss of the capital itself upon which his vote is founded. About the prosperity or ruin of the great empire, in the Government of which that vote gives him a share, he seldom cares at all. No other sovereigns ever were, or from the nature of things ever could be, so perfectly indifferent, about the happiness or misery of their subjects, the improvements or waste of their dominions, the glory or disgrace of their administration, as, from irresistible moral causes, the greater part of the proprietors of such a merchantile company are, and necessarily must be."[1]

This is perhaps a sweeping indictment of the administration of the company as a whole. It, however, holds true of the early rule of the company though the corruption was later gradually eliminated.

In the local or Supreme Government of India, the native inhabitants had no voice. They were barred from all high paid offices and had no scope beyond the position of a petty clerk.

1. '*Wealth of Nations*' (Canner's Ed.) Vol. II, p. 139 *f.n.*

The internal administration was so devised that the Governors and the official staff in their capacity as advisers did or were compelled to do all the thinking for the inhabitants of the country. They enacted, true to a word, the part of Sir John Bowley or the "Poor man's friend" so ably drawn by Charles Dickens : "Your only business, my good fellow, is with me. You need not trouble yourself to think about anything. I will think for you; I know what is good for you; I am your perpetual parent. Such is the dispensation of all all-wise Providence ... what man can do, I do. I do my duty as the Poor man's Friend and Father, and I endeavour to educate his mind, by inculcating on all occasions the one great lesson which that class requires, that is entire dependence on myself. They have no business whatever with themselves."

These Bowleys no doubt did the thinking as a Divine mandate but unfortunately, none the less naturally, their thinking and enacting proved decidedly favourable to England and fatal to India.

How England prospered while India declined may be well impressed on our minds if we recall the economic condition of England immediately before and after 1600 and also the nature of India's tribute to England.

Sir Josiah Child gives very interesting comparative description of the rising prosperity of England after 1545.

According to him, in 1545 "the trade of England then was inconsiderable and the merchants very mean and few"….. "but now", he says "there are more men to be found upon the exchange with ten thousand pounds estates, than were then of one thousand pounds. And if this be doubted let us ask the aged, whether five hundred pounds portion with a daughter sixty years ago, were not esteemed a larger portion than two thousand pounds is now ; and whether gentle women in those days would not esteem themselves well clothed in a serge gown, which a chambermaid now will be ashamed to be seen in... We have now almost one hundred coaches for one we had formerly. We with ease can pay a greater tax now in one year than our forefathers could in twenty. Our customs are very much improved, I believe above the proportion aforesaid, of six to one ;

which is not so much in advance of the rates of goods as by increase of the bulk of trade."[1] By 1600 A.D. the merchantile class had become so powerful that "but for the hostility of the city, Charles I could never have been vanquished, and that without the help of the city, Charles II could scarcely have been restored."[2]

India contributed or rather was made (to)* contribute to the prosperity of England in many ways.

Trade as the augmentation of wealth must be placed in the forefront. Stock quotation is a barometer of business conditions applying the same criterion we will see how much Indian trade was valued in England. "Throughout the (18th) century the Company's stock was always at premium. In 1720 it was quoted as high as £450, but by 1755 it fell to £148. This figure represented much more nearly its real value. Even supposing the dividend of 10% to be average, this would only mean interest at the moderate rate of about $5\frac{1}{3}$ % on the cost price. It continued to fall until 1766, when the prospect of profit from the revenues of Bengal caused an artificial boom, which inflated the price to £233. This was followed by a fall of 60% as a result of war in the Carnatic. From 1779 to 1788 the price was much more reasonable. It averged about £150, although at the crisis of 1784 it fell as low as £118.10 *s.* 0 *d.* After Pitt's Act prices improved and by 1787 it was quoted at £185.10 *s.* 0 *d.* Subsequently the fluctuation's laregely decreased. The Company was now a sovereign ruler than a trading Corporation. It paid a fair interest to its shareholders and its stock was quoted at a price which represented the capitalized value of its profits. There was no further scope for speculation. Its balance-sheet began to resemble the Indian Budget of later years."[3] Dividends paid to the share-holders will also indicate how much India contributed to the wealth of England. "Before the union of 1709 the trade, though subject to great fluctuations, always showed a great profit. In 1682, the dividend reached the enormous figure of 160% but at the end of

* Inserted—ed.

1. *"Discourse of trade"* (1775), pp. 8, 9, 10.

2. T. B. Macaulay, *"History of England"*, Chap. III.

3. F. P. Robinson—"*East India Company",* p. 161.

the century, things were very different. In 1709, after the union, it was only 8% rising, in 1710 to 9% and two years later to 10%, the average rate during the century would work out at about 9% and it only rose above from 1768 to 1771. In 1723 a slight fall was caused by the competition of the French Company, and a further fall of 1% followed an increase of capital and the foundation of the Swedish Company in 1732. In 1744, it rose again to 8% and continued at this rate for eleven years in spite of the continual war both in Europe and in the Carnatic. In J 755, the unsettled condition of the affairs at last had effect and a fall of 2% resulted. In 1760, the cession of Burdwan and other provinces increased the working costs of the Company, and kept the dividend at 6%, so that the sum distributed annually was £1,91,644. In 1767, in consequence of the acceptance of the territorial sovereignty of Bengal, the dividend was raised to 10% and the amount distributed reached £3,19,408. This rise was quite unjustifiable and was largely due to the exaggerated estimate of the prosperity of India. The increased dividends declared in anticipation of large profits which were never fully realized, were paid by means of loans raised at exhorbitant interest. For five years the Company hung on in the hope of better days but in 1772 the crash came and the dividends fell from $12\frac{1}{2}$% to 6%. Lord North then intervened and, for the future, the Company's dividend was subject to ministerial control. The Regulating Act was followed by revenue prosperity and the dividend continued to rise slowly. In 1792 me conclusion of the peace with Tipoo, whereby the Company received a revenue of £2,40,000 and an indemnity of £l ,600,000, was followed by a further rise of 2% and in 1802, the dividend reached 11%."[1] Besides this, "the sums of money paid to the (English) public by the United Company of Merchants of England trading to the East Indies, for their privileges, etc.," "between the years 1798 to 1803 have been estimated by Mr. Macpherson at £25,343,215."[2] Not only India has helped England in her war with America by taking the harden of £3,858,666 but has helped towards the furtherance of Education in America for Mr. Yale founded the Yale College after his name from the money earned exclusively in the Indian Trade.

1. F. P. Robinson—"*East India Company",* pp 159, 160, 161.

2. *cf.. "European Commerce with India"* (1812), Appendix No. II.

Some of the direct and indirect advantages to England from India may be noted in the words of St. George Tucker who says:—

(1) "The East India Company have, at different periods, drawn, a surplus revenue from their territorial possessions to the extent of a million and a half sterling per annum after paying the interest of the territorial debt and this surplus was evidently a direct tribute from India to England."

(2) "About four-fifths of the territorial debt being held by European British subjects, a large proportion of the annual interest, amounting to near two million sterling may be regarded as an *indirect* tribute paid by India to the mother country." "This indirect or private tribute" including the savings, the profits of commerce, etc., Tucker estimates at "three million sterling per annum at the present period" (i.e., about 1821).

(3) "The Shipping of India (that is, the India built ships which are employed in carrying on the trade from port to port in the (eastern Seas) forms no inconsiderable portion of the whole tonnage of Great Britain.

(4) "The possession of India furnishes a most convenient outlet for the present overflowing in one class at least of the community, for whom it is found difficult in all countries, and in none more than our own, to make a suitable provision……. The service of India alone opens a field in which they can be employed *largely* with the prospect of benefit to themselves and to their country."

These do not by any means exhaust the ways by which India contributed to the prosperity of England.

Besides these indirect ways, England adopted more direct and drastic measures to harm India. This was effected through the protective system. England was in no way able to compete with Indian goods and as a manufacturing country, India was England's superior. To destroy the competition of Indian goods which in spite of the cost of transportation ousted the. English goods from their home markets, England adopted a strong protectionist policy.

The following figures will indicate how high the tariff against Indian goods was :—

Alocs duty p.c.	..	280	Oil of Cinnamon	..	400
Assafoefida	..	622	Mace	..	3,000
Benjamin	..	373	Nutmegs	..	250
Borax	..	102	Olibanum	..	400

Cardemoms	..	266	Pepper (black)	..	400
Cassiabuds	..	140	Pepper (white)	..	266
Cloves	..	240	Rhubarb (common)	..	500
Coculus Indicus	..	1,400	Rice (Java)	..	150
Coffee	..	373	Rum (Bengal)	..	1,142
Cubebs	..	320	Sago pearl	..	100
Dragon's blood	..	465	Sugar (Bengal white)	..	118
Gamboge	..	187	Ditoo (Hudding white).		128
Gum Ammoniac	..	466			
Myrph	..	187	Ditoo (low and brown).		152
Nux Vomica	..	266			
Oil of Cassia	..	343			

But England did not stop with this high tariff. She went a step further and made an invidious discrimination against Indian goods which (bore)* import duty much higher than that on the same goods from other parts of the world. This will become manifest by the import duty figures given by M'Aclloch's Commercial Dictionary respecting the goods from the East Indies and West Indies and other colonies.

Articles		East Indies			West Indies, etc.		
		£	s.	d.	£	s.	d.
Sugar per Qnt.	..	1	12	0	1	4	0
Coffee per Ib.	..	0	0	9	0	0	6
Spirits, Sweetend per gallon	..	1	10	0	1	0	0
Spirits not Sweetened per gallon		0	15	0	0	8	6
Tamarinds per Ib.	..	0	0	6	0	0	2
Succades per Ib.	..	0	0	6	0	0	3
Tobacco per Ib.	..	0	3	0	0	2	9
Wood—teak under 8 inches square per load.		1	10	0	0	10	0
Wood—not particularly enumerated, *ad valorem*.		20	per cent		5	per cent	

The English tariff on Indian goods was not not only discriminating but differed with the use to which they were put to in England, as will be seen from the following answers of

* Inserted—ed.

Mr. John Ranking to the questions of the committee of House of Commons in 1813 :—

> Q.—"Can you state what is the *ad valorem* duty on piece-goods sold at the East India House ?"
>
> A.—"The duty on the class called Calicoes is £3 *6s.* 8*d.* per cent upon importation, and if they are used for home consumption there is a further duty of £68 6*s. Sd.* per cent".
>
> "There is another class called Muslins, on which the duty on importation is 10 per cent, and if they are used for home consumption, of £27 *6s.* 8*d.* per cent.
>
> "There is a third class, coloured goods, which are prohibited being used in this country (England), upon which there is a duty upon importation of £3 6*s.* 8*d.* per cent; they are only for exportation".
>
> "This Session of Parliament, there has been a new duty of 20 per cent on the consolidated duties, which will make the duties on calicoes..... used for home consumption, £78,*6s.* 8*d.* per cent upon the Muslim for home consumption ;. £31,*6s.* 8*d.*"

This much for the Parliamentary Exactions, direct and indirect. The Exactions of the Governors and Governor-Generals were by no means small. It is necessary to recall here the words of Sir W.W. Hunter who, describing the morale of the European people, when they came in contact with India, says, "Europe just emerged from mediaevalism, was then making her first experiments in Asiatic rule. Mediaeval conceptions of conquest imposed themselves on her exploitation of the Eastern world : Mediaeval types of commerce were perpetuated in the Indian trade. Portugal, Spain, Holland established their power in Asia when these conceptions and types held sway. The English ascendency in India came later and embodied the European ideals of the eighteenth century in the place of the European ideals of the sixteenth. It was the product of modern as against semi-mediaeval Christendom. Yet even for England it was difficult to shake off the traditions of the period... of monopoly in the Indian trade, and of Indian Government for the personal profit of the rulers."[1] "Self-interest certainly swayed the corrupt and oligarchic legislature, and politics were always discussed on plane from which principles were banished... Men faught avowedly for the most material objects only. Gold ruled the aspirations of the greatest, and India afforded many examples of its fatal power at the time."[2]

1. W, W. Hunter, *"A history of British India"*. Vol. 1, p. 6.
2. G. B Hertz, *"The old colonial system",* p 4.

The battle of Plassey in 1757 and the battle of Wandewash in 1761 gave the English supremacy in Bengal and Madras respectively and they turned both of these victories to their account. Clive, the victor of Plassy became really the king-maker. He sold his support to the Nawab who promised better terms. He not only got great bribes from the Nawabs and Jehagir (Estate) and controlled the salt monopoly in spite of the wishes of the Home authorities but gave perfect liberty to the civil servants—Burke's—"birds of prey and passage"—to indulge in private trade to monopolize certain trades to the utter exclusion of the natives : as a result of this the people were greatly oppressed and reduced to poverty. The wealth of Clive and the poverty of the people are well described by Macaulay, who says "As to Clive, there was no limit to his acquisitions but his own moderation. The treasury of Bengal was thrown open to him. There were piled up, after the usage of the Indian princes, immense masses of coins, among which might not seldom be detected the florins and byzants with which before any European ship had turned the Cape of Good Hope, the Venetians purchased the stuffs and spices of the east. Clive walked between heaps of gold and silver, Crown rubies and diamonds, and was at liberty to help himself..... Enormous fortunes were thus rapidly accumulated at Calcutta, while thirty millions of human beings were reduced to the extremity of wretchedness .....This misgovernment of the English was carried to a point such as seems hardly compatible with the very existence of society. The Roman proconsul, who, in a year or two squeezed out of a province the means of rearing marble palaces and baths on the shores of Campomia, of drinking from Amber, of feasting on singing birds, of exhibiting armies of gladiators and flocks of camelopards; the Spanish viceroy, who, leaving behind him the curses of Mexico or Lima, entered Madrid with a long train of gilded coaches and of sumpter-horses trapped and shod with silver, were now outdone."

Clive ruined the Bengal populace. Hastings the first Governor-General turned to the potentates. His ill-treatment of, and exactions from the Raja of Benares and the Begums of Oudh, his massacre of the Rohillas excited the Catholic sympathies of that great 18th century political philosopher Edmond Burke who by impeachment of Waren Hastings re-enacted so to say, the

memorable impeachment of verres by Cicero for similar reasons. Burke espoused the cause of the oppressed and strained all his nerves to redress their wrongs and punish their offender. The impeachment, in spite of his vigour and the active participation of Sheridan failed but not without its salutary effect It was one of these failures that was worth a hundred victories. Lord Morley in his Life of Burke says, "that Hastings was acquitted was immaterial. The lesson of his impeachment had been taught with sufficiently impressive force—the great lesson that Asiatics have rights, and that Europeans have obligations : that a superior race is bound to observe the highest current morality of the time in all its dealings with the subject race. Burke is entitled to our lasting reverence as the first apostle and great upholder of integrity, mercy and honour, in the relations between his countrymen and their humble dependents."

As a result, the direct mode of administrative exploitation was nipped in the bud : but certain other indirect modes of exploitations were either imposed or suffered to remain by the same administration. These indirect modes of exploitations were the Inland transit duties. The servants of the Company in their capacity of private traders enjoyed perfect immunity from these duties but they were levied with all strictness upon the natives whose economic betterment was thereby greatly hindered.

Mr. Holt Mackengie speaking of these Duties says :

> "Some articles have to run the gauntlet through ten custom-houses, passing at each several subordinate Chowkis (stations), before they reach the Presidency, and little or none of the great stable commodities of the country escape from being subjected to repeated detentions.
>
> "Even supposing that there were no exactions and no delays, still the system would seriously hinder the commercial intercourse of the country, no interchange of goods can take place between districts separated by a line of Chowkis, unless the difference of price shall cover not only the export of transportation and the other charges of merchandise, but also the duty of 5 or $7\frac{1}{2}$ per cent levied by Government Thus also the natural ineqalities of prices aggravated and contrary to every principle, justly applicable to a consumption tax, the burden falls on those places where the consumer would, independently of duty, have most to pay.
>
> "But when to the Government demand are added those of the custom-house officers, it appears to be certain that much trade that would be

carried on by persons of small capital must be absolutely prevented. The rich merchant can afford to pay the utmost demand likely to be made upon him, because a considerable douceur will not fall heavy on a large investment, and because his rank and wealth secures him from any outrageous extortion. But to the petty trader, a moderate fee would consume the probable profit of his adventure, and he has little or no security for moderation,

"Hitherto the attention of the authorities at home, and of the mercantile body generally in England, would appear to have been directed chiefly to the object of finding a market for the manufactures of the United Kingdom. They have consequently looked more to the import than to, the export trade of India. The duties prescribed by Regulation IX of 1810 have accordingly taken off a great number of articles sent from England hither : while of the exports only indigo, cotton, wool and hemp have been made free, and this more with a view, I apprehend, to English than to Indian objects."

It would be profitable to read what Lord Ellenborough has to say regarding these inland transit duties:

"While the cotton manufactures of England are imported into India on payment of a duty of $2\frac{1}{2}$ per cent, the cotton manufactures of Inida are subjected to a duty on yarn of $7\frac{1}{2}$ per cent to an additional duty upon the manufactured article of $2\frac{1}{2}$ per cent, and finally to another duty of $2\frac{1}{2}$ percent, if the cloth should be dyed after the Rowana (pass) has been taken out for it as white cloth. Thus altogether the cotton goods of India (consumed in India) pay $17\frac{1}{2}$ per cent

"The raw hide pays 5 per cent. On being manufactured into leather it pays 5 per cent more ;. and when the leather is made into boots and shoes, a further duty is imposed of 5 per cent. Thus in all there is a duty of 15 per cent (on Indian leather goods used in India).

In what manner do we continue to treat our own sugar ? On being imported into a town it pays 5 per cent in customs, and 5 per cent in town duty, and when manufactured, it pays, on exportation from the same town 5 per cent more, in all 15 per cent (on Indian Sugar used in India).

"No less than 235 separate articles are subjected to Inland Duties. The tariff includes almost everything of personal or domestic use, and its operation, combined with the system of search, is of the most vexatious and offensive character, without materially benefiting the revenue. The power of search, if really exercised by every custom-house officer, would put a stop to internal trade by the delay it would necessarily occasion. It is not exercised except for the purpose of extortion."

Added to this was the lack of uniform currency in India.

All these were a means to kill Indian industries.

Frederick List says, "Had they sanctioned the free importation into England of Indian Cotton and silk goods, the English cotton and silk manufacturers must, of necessity, soon come to a stand. India had not only the advantage of cheaper labour and raw material, but also the experience, the skill and the practice of centuries."

The opinion of Mr. H. H. Wilson, the historian of India is still more emphatic. "It is also a melancholy instance" he admits,

> "of the wrong done to India by the country on which she has become dependent. It was stated in evidence (in 1813) that the cotton and silk goods of India up to the period could be sold for a profit in the British market at a price from 50 and 60 per cent lower than those fabricated in England. It consequently became necessary to protect the latter by duties of 70 and 80 per cent on their value, or by positive prohibition. Had this not been the case, had not such prohibitory duties and decrees existed, the mills of Paisley and Manchester would have been stopped in their outset, and could scarcely have been again set in motion, even by the power of steam. They were created by the sacrifice of the Indian manufacture. Had India been independent, she would have retaliated, would have imposed prohibitive duties upon British goods, and would thus preserved her own productive industry from annihilation. This act of self defence was not permitted her. She was at the mercy of the stranger Brush goods were forced upon her without paying duty, and the foreign manufacturer employed the arm of political injustice to keep down and ultimately strangle a competitor with whom he could not contend on equal terms" : With the result, to quote the words of Mr. Chaplin, that "many manufacturers have been compelled to resort to agriculture for maintenance, a department already overstocked."

Thus the land revenue policy destroyed agriculture and the prohibitory protectionist policy of England ruined the Industries of the country whose wealth attracted these swarms of flies that drenched her to the last dregs.

The resulting misery and poverty of the people knew no bounds and is pathetically described by many a traveller and

Governor. Bishop Heber, travelling in India about 1830 wrote," Neither native nor European agriculturist, I think can thrive at the present rate of taxation. Half the gross produce of the soil is demanded by Government, and this, which is nearly the average rate wherever there is not a Permanent Settlement, is sadly too much to leave an adequate provision for the present, even with the usual frugal habits of the Indians, and the very inartificial and cheap manner in which they cultivate the land. Still more if it (is)* an effective bar to anything like improvement; it keeps the people, even in favourable years, in a state of abject penury; and when the crop fails in even a slight degree, it involves a necessity on the part of the Government of enormous outlays in the way of remission and distribution, which, after all, do not prevent men, women and children dying in the streets in droves, and the roads being strewed with carcasses. In Bengal, where, independent of its exuberant fertility, there is a Permanent Assessment, famine is unknown. In Hindustan, (Northern India) on the other hand, I found a general feeling among the King's officers and I myself was led from some circumstances to agree with them, that the peasantry in the Company's Provinces are, on the whole, worse off, poorer, and more dispirited, than the subjects of the Native Princes; and here in Madras, where the soil is, generally speaking, poor, the difference is said to be still more marked. The fact is, no Native Prince demands the rent which we do, and making every allowance for the superior regularity of our system, etc., I met with very few men who will not, in confidence, own their belief that the people are over-taxed, and that the country is in a gradual state of impoverishment. The Collectors do not like to make this avowal officially. Indeed, now and men, a very able Collector succeeds in lowering the rate to the people, while by deligence he increases it to the State.

But, in general, all gloomy pictures are avoided by them as reflecting on themselves, and drawing on them censure from the Secretaries at Madras or Calcutta, while these, in their turn, plead the earnestness with which the Directors at home press for more money. "Speaking of trade and industries he says," the trade of Surat is now of very trifling consequence, consisting of little but raw cotton, which is shipped in boats for Bombay. All

***** Inserted—ed.

the manufactured goods of the country are undersold by the English.. a dismal decay has consequently taken place in the circumstances of the native merchants. "Regarding the decay of Dacca the same authority says, "Its trade is reduced to the sixtieth part of what it was, and all its splendid buildings,… the factories and the Churches of the French, Dutch and Portuguese Nations are all into ruin, and overgrown with jungle."

To ameliorate their misery, natives petitioned Parliament saying, "that every encouragement is held out to the exportation from England to India of the growth and produce of foreign, as well as English industry, while many thousands of the natives of India, who, a short time ago, derived a livelihood from the growth of cotton and the manufacture of cotton goods, *are without bread,* in consequence of the facilities afforded to the produce of America, and the manufacturing industry of England." But the appeal was made in vain and the interests of England always remained in the forefront in the eyes of those that were called upon to rule the destinies of India.

Though, as Bishop Heber rightly says that the officers of the Company avoid "all gloomy pictures" of the misery of the people, there are others who, marked by independence of opinions, are quite as explicit as they are emphatic on this point.

The Court of Directors wrote on May 7th, 1766 :

> "We have the sense of the deplorable state…….from the corruption and rapacity of our servants, and the universal depravity of manners throughout the settlement……. Think the vast fortunes acquired by a scene of the most tyrannic and oppressive conduct that ever was known in any age or country."

Clive, though criminal himself, was conscious of the oppression for, he wrote to George Dudley on September 8th, 1766 :

> "But retrospection into actions which have been buried in oblivion for so many years; which if inquired into, may produce discoveries which cannot bear the light……..but may bring disgrace upon the nation, and at the same time blast the reputation of great and good families."

Sir Thomas Munro was so indignant at the misrule of the Company that he said, "It would be more desirable that we should be expelled from the country altogether, than that the result of our

system of Government should be such an abasement of a whole people.

Mr. Martin in his "Eastern India" 1838 says, "The annual drain of £3,000,000 on British India has amounted in thirty years, at 12 per cent (the usual Indian rate) compound interest, to the enormous sum of £723,900,000 sterling ... So constant and accumulating a drain, even in England, would soon impoverish her. How severe, then, must be its effects on India, where the wage of a labourer is from two pence to three pence a day ! Were the hundred millions of British subjects in India converted into a *consumpting* population, what a market would be presented for British capital, skill and industry! " Mr. Frederick John Shore of the Bengal Civil Service very pathetically said:

> "But the halcyon days of India are over; she has been drained of a large proportion of the wealth she once possessed, and her energies have been cramped by a sordid system of misrule to which the interest of millions have been sacrificed for the benefit of the few. The gradual impoverishment of the people and the country, under the mode of rule established by the English Government has.... the grinding extortions of the English Government have effected the impoverishment of the country and people to an extent almost unparalleled..... "
>
> "The fundamental principle of the English had been to make the whole Indian Nation subservient in every possible way to the interest and benefit of themselves..... Had the welfare of the people been our object, a very different course would have been adopted, and a very different result would have followed."

But such was not to be the case. Nay, it would have been unnatural had it been otherwise, for Mill says, "the Government of a people by itself has a meaning and a reality ; but such a thing as Government of one people by another does not, and cannot exist. One people may keep another for its own use, a place to make money in, a human cattle-farm to be worked for the profits of its own inhabitants."

The administration of the East India Company was a prototype of the Roman provincial administration, under the Roman Empire, however, local liberties were conserved. Monesen says, "The Roman provincial constitution, in substance, only concentrated military power in the hands of the Roman Governor,

while administration and jurisdiction were, or at any rate were intended to be, retained by the communities, so that as much of the old political independence as was at all capable of life might be preserved in the form of communal freedom."

But the British suppressed everything, and just as Mr. Ferrero insists on our abandoning "one of the most widespread misconceptions which teaches that Rome administered her provinces in broad-minded spirit, consulting the general interest, and adopting wide and benefit principles of Government for the good of the subjects," so must we guard against any complacent view of the administration of the East India Company, so current among historians who labour hard to show that with the interval of 1700 years, human nature had greatly advanced in moral standard.

Short may have been our discussion of the situation before the East India Company, it is quite sufficient to show that the supplanter of the Moghuls and the Marathas were persons with-no better moral fiber and that the economic condition of India under the so-called native despots and brigands was better than what was under the rule of those who boasted as being of superior culture.

It is with industries ruined, agriculture "overstocked" and over-taxed with productivity too low to bear high taxes, with few avenues for display of native capacities, the people of India passed from the rule of the Company to the rule of the Crown.

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PART II

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THE UNTOUCHABLES AND THE PAX BRITANNICA

[The Manuscript consisting of 123 typed pages is a presentation of the case of neglect of the Depressed Classes by the British Government which did not admit them as members of the Armed Forces. The manuscript, of which the first page is missing, was prepared by Dr. Ambedkar during his stay for the Round Table Conferences in London according to his Marathi biographer Mr. C. B. Khairmode. The MS. is printed herein as it was found—ed.]

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*of the American Continent the objective of his voyage was reach India. Even this voyage of Columbus was not a sudden venture. It was a part of a plan of exploration of a sea route to India which he had received its first impetus from Prince Henry of Portugal, who was greatly interested in it and who in his reign of 42 years (1418—1460) helped it in every possible way.

What was the necessity for this quest for a direct sea route from Europe to India which impelled the Portuguese, the Dutch, the French and the English to come out of their seclusion. The coming of the English to India was not an adventure of a singular race. It was a concerted effort and there was so much eagerness on the part of each European nation that within this concert there was a competition for reaching India first. Because the Portuguese came first it does not follow that the rest were idle or indifferent. The English and the Dutch were under the belief that there was a shorter route to India than that of the Cape of Good Hope and their delay in their coming to India was due to the fact that they were busy in finding out its possibilities. The French, though last to arrive, were second only to the Portuguese, their first voyage being to Sumatra in 1529.

What was the origin of this eagerness to reach the Indies ? Why did the Portuguese, Spaniards, English, French and Dutch vie with one another in centuries of strenuous effort to find a sea route to India. The object was to obtain luxuries and particularly spices—chillies, cloves, nutings etc., which could be had only from India and the East.

This seems rather strange—that all this run should be for spices. But the fact is that spices did play a very important part in this expansion of Europe.

How much spices were used and appreciated by the European peoples in the fifteenth and sixteenth centuries can be seen, from the following data collected by Prof. Cheyney [1] :

> "One of the chief luxuries of the Middle Ages was the edible spices. Wines and ale were constantly used spiced with various condiments. In Sir Thopa's forest grew *"notemuge to putte in ale"*.

* First page containing the earlier portions of this MS is missing. The title of this essay also is nowhere found. The present title is given from the typed outline in the custody of People's Education Society, Bombay—ed.

European Background of American History, p. 10-11.

"Froissart has the king's guests led to the "palace, where wine and spices were set before them". The dowry of a Marseilles girl, in 1224, makes mention of "mace, ginger, cardamom and galangale."

"When John Ball wished to draw a contrast between the lot of the lords and the peasants, he said, "They have wines, spices and fine bread, when we have only rye and the refuse of the straw,". When old Latiner was being bound to the stake he handed nutmegs to his friends as keepsakes.

"Pepper, the most common and at the same time the most valued of these spices, was frequently treated as a gift of payment instead of money. "Matilda de Chaucer is in the gift of the king, and her land is worth £8,*2d.,* and 1 pound of pepper and 1 pound of cinnamon and 1 ounce of silk", reads a chance record in an old English survey. The amount of these spices demanded and consumed was astonishing. Venetian galleys Genoese varracks, and other vessels of the Mediterranean brought many a cargo of them westward, and they were sold in fairs and markets every where. "Pepper-sack" was a derisive and yet not unappreciative epithy applied by German robber-barons to the merchants, who they plundered as they passed down the Rhine. For years the Venetians had a contract to buy from the Sultan of Egypt annually 420,000 pounds of pepper. One of the first vessels to make its way to India brought home 210,000 pounds. A fine of 200,000 pounds of pepper was imposed upon one petty prince of India by the Portuguese in 1520. In romances and chronicles, in cook-books, trades-lists, and customs-tarriffs spices are mentioned with a frequency and consideration known in modern times."

Why were spices so necessary to the European peoples of those days ? One answer is taste. "The monotonous diet, the coarse food, the unskilful cookery of mediaeval Europe had all their deficiencies covered by a charitable mantle of Oriental seasoning."[1] While it was a matter of taste for all it was a matter of necessity for the poor. The poor needed spices. In ancient times when food was scarce and the productivity of man in the absence of machinery was very low, man could not afford to waste or throw away food as being stale. Whatever was left over or was not necessary for immediate consumption had to be preserved. Spices are the best preservatives. It was because of this as also for reasons of taste that spices were in mediaeval Europe in such universal demand.

1 Cheyney. *Ibid,* p. 10.

Another question is why was a direct sea route necessary for these European nations to reach India and to obtain spices. Before the European nations discovered the sea route to India via the Cape of Good Hope there were in existence three well established land routes by which these luxuries and spices used to reach Europe and known as the Northern, the Middle and the Southern routes.

The Northern route lay between the Far-East and the West, extending from the inland provinces of China westward across the great desert of Gobi, south of the Celestial mountains to Lake Lop then passing through a series of ancient cities, Khotan, Yarkand, Kashgar, Samaro and Bokhara, till it finally reached the region of the Caspian Sea. This main northern route was joined by others which crossed the passes of the Himalayas and the Hindookush, and brought into a United Stream, the products of India and China. A journey of eighty to a hundred days over desert, mountain, and steppes lay by this route between the Chinese wall and the Caspian. From still farther north in China a parallel road to this passed to the north of the desert and the mountains and by way of Lake Balkash, to the same ancient and populous land lying to the east of the Caspian Sea. Here the caravan routes again divided. Some led to the south-westward, where they united with the more central routes described above and eventually reached the Black Sea and the Mediterranean through Asia Minor and Syria. Others passed by land around the northern coast of the Caspian, or crossed it, reaching a further stage at Astrakhan. From Astrakhan the way led on by the Volga and on rivers, till its terminus was at last reached on the Black Sea at Tana near the mouth of the Don, or at Kaffa in the Crimea.

The Middle route lay through Mesopotamia and Syria to the Levant. Ships from India crept along the Asiatic shore to the Persian Gulf, and sold their costly freights in the marts of Chaldea or the lower Euphrates. A line of trading cities extending along its shores from Ormuz near the mouth of the gulf to Bassorah at its head served as ports of call for the vessels which carried this

merchandise. Several of these coast cities were also termini of caravan routes entering them from eastward, forming a net-work which united the various provinces of Persia and reached through the passes of Afghanistan into northern India. From the head of the Persian Gulf one branch of this route went up the line of the Tigris to Bagdad. From this point goods were taken by caravan through Kurdistan to Tabriz, the great northern capital of Persia, and thence westward either to the Black Sea or to Layas on the Mediterranean. Another branch was followed by the trains of camels which made their way from Bassorah along the tracks through the desert which spread like fan to the westward, till they reached the Syrian cities of Aleppo, Antioch, and Damascus. They finally reached the Mediterranean coast at Laodicea, Tripoli, Beirut, or Jaffa, while some goods were carried even as far south as Alexandria.

The southern route was a sea route in all except its very latest stages. It lay through the Red Sea and brought the products of India and the Far East by sea to Egypt, whence they passed to Europe from the mouths of the Nile.

The land routes were devious and dangerous. They were insecure and transportation over them was difficult and expensive. Robbers plundered the merchants and Governments taxed them beyond measure. Of the two land routes the Northern was not a highway to the same extent as the middle one was. With its deadly camel journey of alternate shows and torried wastes, rendered it available only for articles of small bulk. It never attained the importance of the Middle route. Even this Middle or Indo-Syrian route was not always open. It was blocked twice. Once between 632—651 A. D. when the Saracen Arabs under the conquering impulse of Islam seized the countries of this Indo-Syrian route. For a second time it was blocked during the crusades in the 11th Century. The southern route which was for most part a sea route was equally unsafe. "The storms of the Indian Ocean and its adjacent waters were destructive to vast numbers of the frail vessels of the East; piracy vied with storms in

its destructiveness; and port dues were still higher than those of inland marts."[1] But as Prof. Cheyney observed, "With all these impediments, Eastern products, nevertheless, arrived at the Mediterranean in considerable quantities"[2] and were available to the European merchants.

When these land routes existed why did there arise the necessity for a sea route ? The answer is the Turkish and Mongol upheaval in further Asia which overtherw the Saracenic culture and ruined the trade with Europe. This upheaval was a new force. It first came into operation when about 1038 the selfwill Turks burst upon Persia. Two centuries later the Mongols poured over Asia under Chengizkhan. In 1258, the Mongols captured Bagdad. In 1403 Timur captured Syria. In 1453 Constantinople fell to the Turks. This upheaval of the Turks and the Mongols completely blocked the two land routes. The Southern route was the only route that was open for some time. But even that was blocked when Egypt was conquered by the Turks in 1516.

Two factors are responsible for bringing the European Nations to India. First spices. Second the blocade of the old overland Trade routes by the Turks and the Mongols. It is these factors which drove the European nations to search for a sea route to India and which they ultimately found.

Having come to trade with the East Indies, these Europeans remained there to conquer it. That evidently resulted in a struggle for supremacy. The struggle between the English and the Portuguese and the Dutch on the other band was for commercial supremacy. The theatre of the struggle between the English and the Portuguese was India and the Persian Gulf and ended in favour of the British in 1612, so far as India was concerned and in 1622 so far as the Persian Gulf was concerned. From 1622 India and the Persian Gulf lay open to England and the Portuguese ceased to be any menace to development of English trade and commerce. The theatre of the struggle between the English

1. Cheyney *Ibid,* p. (not mentioned in MS.—ed.)

2. *Ibid,* p.

and the Dutch lay in Malaya Archipelego. It was decided against the English in 1823 by what is called the Mascaere of Amboyana whereby the English receded to India and left the Dutch to enjoy exclusively the trade with the Malaya Archipelego. The struggle between the English and the French was a mighty struggle. The theatre of this struggle was India proper. The object of this struggle was political sovereignty and not commerce. The French had established themselves in the South and the East. So far as Southern India is concerned the conflict began in 1744 and ended in 1760 at the battle of Wandiwash where the French were completely vanquished. So far as Eastern India is concerned the struggle was a single battle in 1757—the battle of Plassey in which French lost along with the Nawab whom they supported as against the English. With the elimination of the French, the English alone were left to be the rulers of India.

* * *

But how was the conquest of India received by the people of India?

* * *

From a certain point of view the conquest of India by the British was an accident. As an accident it has come to be regarded as a part of destiny. In this sense Lord Curzon was justified when he said—

(Quotation not given in the MS.—ed.)

What have they done for the people of India ? This is too large a question. Many volumes having been written on it, is unnecessary for me to add to what has already been said. I am reducing the question to a narrow compass and ask what have the British done for the Untouchables ? What did the British do when they became rulers to emancipate and elevate the Untouchables ? There are many heads in relation to which this question may be raised. But I propose to it Public Service, Education and Social Reform.

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* * * These stars indicate the blank space left in the MS.—ed

II

What did the British Government do to secure to the Untouchables adequate representation in the Public Services of the Country ?

I will take the Army first. To understand and appreciate the fate that has befallen the Untouchables it is necessary to ask what is it that enabled the British to conquer India ?

The conquest of India is an extraordinary event. And this is for two reasons.

The countries which were suddenly thrown open to the European nations at the end of the fifteenth century fall into three classes. Vasco Da Gama threw open countries in which for the most part thickly populated and which were governed by ancient, extensive and well organised states existed. In the second category fell countries discovered by Columbus in which the population was small and the state was of a very rudimentary character. The third category consisted of countries discovered by…….They were just empty areas with no population at all. India fell in the first of these three categories. This is one reason why the conquest of India must be said to be an extraordinary event.

The second reason why the conquest of India is an extraordinary event is the period during which this conquest has taken place. When was India conquered? India was conquered between 1757 and 1818.

In the year 1757 there was fought a battle between the forces of the East India Company and the Army of Siraj-ud-Daulah, the Nawab of Bengal. The British forces were victorious. It is known in history as the battle of Plassey and it is as a result of this battle that the British for the first time made territorial conquest in India. The last battle which completed the territorial conquest was fought in 1818. It is known as the battle of Koregaon. This was the battle which destroyed the Maratha Empire and established in its place the British Empire in India. Thus the Conquest of India by the British took place during 1757 and 1818. What was the state of affairs in Europe during this very period and what was

the position of the English people ? This period was one of great turmoil in Europe. It was a period of Napoleonic wars the last of which was fought in 1815 at Waterloo. In these wars England was no idle spectator. It was deeply involved in these wars. It was at the head of all the European States which had formed an alliance to crush Napoleon and the French Revolution. In this grim struggle the English nation wanted every penny, every man, every ship and every gun for its own safety. It could spare nothing for the East India Company which was operating in a theatre far removed from the home base. Not only could they spare nothing to help the East India Company but they actually borrowed men, money and ships from the East India Company to fight Napolean in the European War thereat. The following date from Macpherson gives an idea as to how much the East India Company had to contribute to the English nation for the support of the wars in Europe.

It is during this period when the English people were wholly occupied in Europe in a deadly struggle with Napoleon and when they could not assist the East India Company in any way that India was conquered. It is this which makes the conquest such an extraordinary event. How did this extraordinary event become possible ? What is the explanation ?

Macaulay has given his explanation. He says :

(Quotation not given in the MS.)

Macaulay's explanation is the explanation which all Englishmen believe, like to believe. Being current for a long time it has got a hold upon the minds of the English people and all European and American people. Indeed an endeavour is made to inculcate this view upon the minds of the younger generation of English people. It is quite understandable. An important element in the make up of an imperial race is the superiority complex and Macaulay's view goes to foster it as nothing else can.

But is Macaulay's view right ? Do the facts of history support that view ? Professor Seely who has studied this subject in a more realistic way than Macaulay did say :

> "In the early battles of the Company by which its power was decisively established, at the seige of Arcot, at Plassey, at Buxer, there seem almost

always to have been more sepoys than Europeans on the side of the Company. And let us observe further that we do not hear of the sepoys as fighting ill, or of the English as bearing the whole brunt of the conflict. No one who has remarked the childish eagerness with which historians indulge their national vanity, will be surprized to find that our English writers in describing these battles seem unable to discern the sepoys. Read Macaulay's Essay on Clive; everywhere it is 'the imperial people,' 'the mighty children of the sea,' 'none could resist Clive and his Englishmen.' But if once it is admitted that the sepoys always outnumbered the English, and that they kept pace with the English in efficiency as soldiers, the whole theory which attributes our successes to an immeasurable natural superiority in valour falls to the ground. In those battles in which our troops were to the enemy as one to ten, it will appear that if we may say that one Englishman showed himself equal to ten natives, we may also say that one sepoy did the same. It follows that, though no doubt there was a difference it was not so much a difference of race as a difference of discipline, of military science, and also no doubt in many cases on difference of leadership.

Observe that Mill's summary explanation of the conquest of India says nothing of any natural superiority on the part of the English. 'The two important discoveries for conquering India were ; 1st the weakness of the native armies against European discipline, 2ndly the facility of imparting that discipline to natives in the European service'. He adds ; 'Both discoveries were made by the French.'

And even if we should admit that the English fought better than the sepoys, and took more than their share in those achievements which both performed in common, it remains entirely incorrect to speak of the English nation as having conquered the nations of India. The nations of India have been conquered by an army of which on the average about a fifth part was English. But we do not only exaggerate our own share in the achievement; we at the same time entirely misconceive and misdescribe the achievement itself. From what race were the other four-fifths of the Army drawn ? From the Natives of India themselves! India can hardly be said to have been conquered at all by foreigners ; She has rather conquered herself."[1]

This explanation of Prof. Seely is correct as far as it goes. But it is not going far enough. India was conquered by the British with the help of an Army composed of Indians. It is well for Indians as well as for the British not to overlook this fact. But who were these Indians who joined the army of their foreigners ? That question Prof. Seely did not raise. But it is a very pertinent question. Who were these people who joined the army of the East

1. Seely, *Expansion of England,* p. 200—202.

India Company and helped the British to conquer India ? The answer that I can give—and it is based on a good deal of study—is that the people who joined the Army of the East India Company were the Untouchables of India. The men who fought with Clive in the battle of Plassey were the Dusads, and the Dusads are Untouchables. The men who fought in the battle of Koregaon were the Mahars, and the Mahars are Untouchables. Thus in the first battle and the last battle it was the Untouchables who fought on the side of the British and helped them to conquer India. The truth of this was admitted by the Marquess of Tweedledale in his note to the Peel Commission which was appointed in 1859 to report on the reorganization of the Indian Army. This is what he said—

(Quotation not given in the MS.—ed.)

There are many who look upon this conduct of the Untouchables in joining the British as an act of gross treason. Treason or no treason, this act of the Untouchables was quite natural. History abounds with illustrations showing how one section of people in a Country have shown sympathy with an invader, in the hope that the new comer will release them from the oppressions of their countrymen. Let those who blame the Untouchables read the following manifesto issued by the English Labouring Classes in 17 (Left incomplete).

* * * (Extracts not given in MS.—ed.).

Was the attitude of the Untouchables in any way singular ? After all, the tyranny under which the English Labourer lived was nothing as compared with the tyranny under which the Untouchables lived and if the English workmen had one ground to welcome a foreign invader the Untouchable had one hundred.

(Space left blank in the MS.—ed.)

Not only did the Untouchables enabled the British to conquer India, they enabled the British to retain. The Mutiny of 1857 was an attempt to destroy British Rule in India. It was an attempt to drive out the English and reconquer India. So far as the Army was concerned the Mutiny was headed by the Bengal Army.[1] The Bombay Army and the Madras Army remained loyal and it was

1. The Bengal Army was so called because it was under the control of the Bengal Government and not because it was composed of Bengalees. As a matter of fact there were no Bengalees in it. It was formed mostly from up-countrymen.

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with their help that the Mutiny was suppressed. What was the composition of the Bombay Army and the Madras Army ? They were mostly drawn from the Untouchables, the Mahars in Bombay and the Pariahs in Madras. It is therefore true to say that the Untouchables not only helped the British to conquer India they helped them to retain India.

How have the British treated the Untouchables so far as service in the Army is concerned ? Strange as it may appear, the answer is that the British Government has since about 1890 placed a ban on the recruitment of the Untouchables in the Indian Army. The result was that, those who had already been recruited remained. It is a great mercy that they were not disbanded. But in course of time they died or went on pension and ultimately by about 1910 completely disappeared from the Army. Nothing can be more ungrateful than this exclusion of the Untouchables from the Army.

Why did the British commit an act which appears to be an act of treachery and bad faith ? No reason has ever been given by the British Government for this ban on the recruitment of the Untouchables into the Army. It is often heard that this exclusion is not intentional but is the consequence of a policy initiated in the interest of the efficiency of the Army in about the year 1890. But is this so ?

This policy is based on two principles, one relating to organization and the other relating to recruiting.

The principle of organization that was introduced in 1890 is known as the principle of class composition as against the old principle of a mixed regiment. Under the new principle, the Indian Army was organized on the principle of class regiment or the class squadron or company system. This means, in the first case, that the whole regiment is composed of one class (or caste) and in the second case, that every squadron or company is formed entirely of one class. The old principle of recruiting was to take the best men available, no matter what his race or religion was. Under the new principle, race of the man became a more important factor than his physique or his intellect. For the purposes of recruitment, the different castes and communities of India are divided into categories, those belonging to the martial races and those

belonging to the non-martial races. The non-martial races are excluded from military service. Only the castes and communities which are included in the category of martial races are drawn upon for feeding the Army.

It is difficult to approve of these two principles. The reasons which underlie the principle of class composition it is said, "are to a certain extent political, as tending to prevent any such formidable coalition" against the British, as occurred in the Mutiny. I should-have thought that the old system of a mixed regiment was safer.' But assuming that the principle is sound, why should it come in the way of the recruitment of the untouchables ? If, under the system of class composition, there can be regiments of Sikhs, Dogras, Gurkhas, Rajputs etc., why can there not be regiment of Untouchables ? Again, assuming that recruitment from martial races only is in sound principle, why should it affect adversely (to) the untouchables unless they are to be treated as belonging to the non-martial races ? And what justification is there for classing the untouchables who formed the backbone of the Indian Army and who were the mainstay of the Indian fighting forces for over 150 years as non-martial ? That the British Government does not deem the Untouchables as belonging to non-martial classes is proved by the fact, that in the Great War, when more men were necessary for the Army, this ban on the recruitment of the Untouchables in the Army was lifted and one full battalion was raised and was known as the 111 Mahars. Its efficiency has been testified by no less a person than that (. . . .)*. When the need was over and the Battalion was disbanded much to the chagrin and resentment of the Untouchables. Sir
said:

(Quotation not given in the MS.—ed.)

With this testimony who can say that the Untouchables are a non-martial race ?

It is thus obvious that none of the two reasons supposed to be responsible for the exclusion of the Untouchables from the Army. What is then the real reason ? In my opinion, the real reason for the exclusion of Untouchables from the Army is their

1. See also the opinion of General Wilcox in his "*With Indians in France*" p. (page No. not mentioned in MS.)

* Left blank in MS.—ed.

Untouchability. Untouchables, were welcome in the Army so long as their entry did not create a problem. It was no problem in the early part of the British history, because the touchables were out of British Army. They continued to be outside the British Army so long as there were Indian Rulers. When, after the Indian Mutiny, the Race of Indian rulers shrivelled, the Hindus began to enter the British Army which was already filled with the Untouchables; then arose a problem—a problem of adjusting the relative position of the two groups—touchables and untouchables—and the British, who always, in cases of conflict between justice and convenience, prefer convenience, solved the problem by just turning out the Untouchables and without allowing any sense of gratitude to come in their way.

Whatever the reasons of this exclusion, whatever the justice of this exclusion, the fact remains that the effect of this exclusion has proved most disastrous in its social consequences to the life of the Untouchables. The Military Service was the only service in which it was possible for the Untouchables to earn a living and also to have a career. It is a part of history that many untouchables had, done meritorious service in the field and hundreds had risen to the status of Jamadar, Subhedar and Subhedar Majors. The Military occupation had given them respectability in the eyes of the Hindus and had given them a sense of importance, by opening to them places of power, prestige and authority. Having been used to service in the Army for over 150 years, the Untouchables had come to regard it as a hereditary occupation and had not cared to qualify themselves for any other. Herein 1890—they were told that they were not wanted in the Army, without giving them any time to adjust themselves to the new circumstances—as was done in die case of the Anglo-Indians in 1935. When this service was closed, the Untouchables received a stunning blow and set-back from which they have not recovered. They were thrown from a precipice and without exaggeration, fell far below the level at which they had stood under the native Governments.

So much for the entry of the Untouchables in the Military service. What is the position with regard to their entry in the civil service ?

The Civil Service requires a high degree of education from the entrant. Only those with University degrees can hope to secure admission. The Untouchables have been the most uneducated part of India's population. The Civil Service has been virtually closed to them. It is only recently, that there have been among them men, who have taken University degrees. What has been their fate ? It is no exaggeration to say that they are begging from door to door. Two things have come in the way of their securing an entry in the Civil Services. Firstly, the British Government refused to give them any preference. Not that the British Government did not recognize the principle of giving preference to communities which were not sufficiently represented in the Civil Services. For instance, the British Government has definitely recognized that the Mahomedans should get preference provided he has minimum qualification. That, this principle has been acted upon in their case, is evident from the nominations, which the Government of India has made to the I. C. S. since the year when the Government took over power to fill certain places in the I. C. S. by nomination.

Not a single candidate from the untouchables has been nominated by the British Government, although there were many, who called, have satisfied the test of minimum qualification.

The second reason, why the untouchables, though qualified by education, have not been able to find a place in the Civil Service is, because of the system of recruitment for these services, Under the British Government, the authority to fill vacancies is left with the head of the department. Heads of Department have been and will long continue to be high Caste Hindus. A caste Hindu by his very make up is incapable of showing any consideration to an untouchable candidate. He is a man (with)* strong sympathies and strong antipathies. His sympathies make him look first to his family, then to his relations, then to his friends and then to members of his caste. Within this wide circle, he is sure to find a candidate for the vacancy.[1] It is very seldom that he is required to travel beyond the limits of his caste. If he has to, then the Untouchable

* Inserted—ed.

1. That this is the principle on which vacancies are filled is too well known to be disputed. In fact it is so well established that if one were to know the caste of the Head of the Department, one could tell of what caste is the personnel of the Department.

will have, only if there is no other touchable Hindu to compete with them. If there is a competitor from any of the touchable caste, the Untouchable will have no chance. Thus the Untouchable is always the last to be considered in the matter of appointments to the Civil Service. Being the last to be considered, his chances of securing a post are the least.

There are two services for which the Untouchable is particularly suited. One is the Police Service and the other is menial service in Government Offices. What is the position of the Untouchables so far as police service is concerned ?

The answer is that the Police Service is closed to them.

On the 17th December 1925, a resolution was moved in the Legislative Council of the United Provinces, asking Government to remove all restrictions on the entry of the Untouchables in Government service and especially the Police Service, the Member of Government in charge of the Department, speaking on behalf of Government said :

> "No, if the Honourable members wish to leave it open to all, I have no objection. But I will certainly object to any member of a criminal tribe or a low caste man like a chamar in this force at present."

On 22nd July 1927, Lala Mohan Lal asked the following question in the Punjab Legislative Council:

> **Lala Mohan Lal:** Will the Hon'ble Member for Finance be pleased to state if members of the depressed classes are taken in the police ? If not, does the Government intend to direct that, in the matter of recruitment of police constables, the members of the depressed classes should also be taken?
>
> **The Hon'ble Sir Geoffrey de Montmorency :** Members of the depressed classes are not enrolled in the police. When there is evidence that the depressed classes are treated on an equal footing by all sections of the community, (which may not happen till dooms day) or when Government is satisfied that enrolment of members of these classes will satisfy the requirements of efficiency and be in the best interests of the composition of the service, Government will be quite prepared to throw open recruitment to them, provided they come up to the physical and other standards required of all recruits.

The Committee appointed by the Government of Bombay in 1928 reported as follows on this questions:

(Quotation not given in the MS.)

As to menial service, that also has been closed to them. Few will believe it, nonetheless it is a fact and few will be able to guess the reason, though it is quite plain. The reason why the untouchable is excluded from menial service is the same for which he is excluded from the Police Service. It is Untouchability. As part of his duty, a constable has to arrest a person. As a part of his duty, a constable has to enter the house of a person, for instance, to execute a search warrant. What would happen if the person arrested is a Hindu and the constable is an Untouchable ? Police constables have to live in lines as neighbours, use the water taps. What would be the reactions of a Hindu constable if his neighbour is an Untouchable constable ? These are the considerations which have barred the entry of the Untouchable in the Police Service. Exactly the same consideration have been operative in the case of menial service. A menial in Government office is, in law, required to serve in the office. But his service brings him in contact with others who are Hindus. His contact causes pollution. How could he be welcome. Besides, according to convention, a peon in office is supposed to serve the head of the Department and also his household. He has to bring tea for the boss, he has to do shopping for the wife of the boss, and he has to look after the children. The Head of the Department has to forego these services if the menial appointments went to the Untouchables. Rather than forego these services, the Untouchable was deprived of his right to serve. So complete was this exclusion that the Bombay Committee had to make a special recommendation in this behalf.

III

What did the British Government do about the education of the Untouchables ? I will take the Presidency of Bombay by way of an illustration. The period of British administration, so far as Education is concerned, can be divided into three convenient periods.

I.—From 1813 to 1854

1. Education under the British Rule in the Bombay Presidency must be said to have begun with the foundation of the Bombay Education Society in 1815. That Society did not confine its efforts to the education of European children. Native boys were encouraged to attend its schools at Surat and Thana and at the beginning of 1820, four separate schools for natives had been opened in Bombay and were attended by nearly 250 pupils. In August of the same year, further measures were taken to extend native education. A special committee was appointed by the Society to prepare school books in the Vernacular languages, and to aid or establish Vernacular schools. But the wide scope of the undertaking was soon seen to be beyond the aims of a society established mainly for the education of the poor; and in 1822, the committee became a separate corporation, thenceforth known as the Bombay Native School Book and School Society, which name was in 1827 changed into the Bombay Native Education Society. The Honourable Mountstuart Elphinstone was the new Society's first President. The Vice-Presidents were the Chief Justice and the three members of the Executive Council of the Bombay Government; and the managing committee consisted of twelve European and twelve native gentlemen, with Captain George Jervis R. E., and Mr. Sadashiv Kashinath Chhatre as Secretaries. The Society started its work with a grant of Rs. 600 per mensem from the Government. As early as 1825, the Government of Bombay had along side, began to establish primary schools at its own expense in district towns and had placed them under the control of the Collectors. To co-ordinate the activities of these two independent bodies, there was established in 1840 a Board of Education composed of six members, 3 appointed by Government and 3 appointed by the Native Education Society. This Board was in charge of the Education Department till the appointment of the Director of Public Instruction in 1855.

2. On the 1st March 1855, when the Board was dissolved, there was in the Presidency of Bombay under the charge of the Board, 15 English Colleges and Schools having 2850 students on the Register

and 256 vernacular schools having 18,883 students on the Register. In the same report it is stated by the Board :

> "24. In August (1855) we received a petition from certain inhabitants of Ahmednagar, praying for the establishment of *a school for the education of low castes* and engaging to defray one-half of the teacher's salary, in accordance with the terms of the late rules. A school room had been built by the petitioner and the attendance of boys was calculated at thirty. The establishment of such a school was opposed to the prejudice of the richer and higher castes, and there was some difficulty in procuring a teacher on a moderate salary, but as the application was made in strict accordance with the conditions stated in the late notification on the subject, we readily complied with the request, and the school was opened in November. We merely mention the subject, as it is the first occasion on which we have established a school for these castes".

3. The statement by the Board, that this was the first occasion when a school for the low castes was established in this Presidency, naturally raises the question what was the policy of the British Government in the matter of the education of the Depressed Classes before 1855? To answer this question, it is necessary to have a peep into the history of the educational policy of the British Government in this Presidency from 1813 to 1854. It must be admitted that under the Peshwa's Government the Depressed classes were entirely out of the pale of education. They did not find a place in any idea of state education, for the simple reason that the Peshwa's Government was a theocracy based upon the cannons of Manu, according to which the Shudras and Atishudras (classes corresponding to the Backward classes of the Education department), if they had any right of life, liberty and property, had certainly no right to education. The Depressed classes who were labouring under such disabilities, naturally breathed a sigh of relief at the downfall of this hated theocracy. Great hopes were raised among the Depressed classes by the advent of the British Rule. Firstly, because, it was a democracy which, they thought, believed in the principle of one man (one)* value, be that man high or low. If it remained true to its tenets, such a democracy was a complete contrast to the theocracy of the Peshwa. Secondly, the Depressed classes had helped the British to conquer the country and naturally believed that the British would in their turn help them, if not in a special degree, at least equally with the rest.

*Inserted—ed.

4. The British were for a long time silent on the question of promoting education among the native population. Although individuals of high official rank in the administration of India were not altogether oblivious of the moral duty and administrative necessity of spreading knowledge among the people of India, no public declaration of the responsibility of the State in that behalf was made till the year 1813, when by section 43 of the Statute 53 George IV, chap. 155 Parliament laid down that" out of the surplus revenues of India, a sum of not less than one lakh of rupees in each year shall be set apart and applied to the revival and improvement of literature and the encouragement of the learned natives of India, and for the introduction and promotion of a knowledge of sciences among the inhabitants of British territories in India etc. "This statutory provision, however, did not result in any systematic effort, to place the education of the natives upon a firm and organised footing till 1823. For, the Court of Directors in their despatch dated 3rd June 1814 to the Governor General in Council, in prescribing the mode of giving effect to section 43 of the statute of 1813, directed that the promotion of Sanskrit learning among the Hindus would fulfil the purposes which Parliament had in mind. But what a disappointment to the Depressed classes, there was, when systematic efforts to place the education of the natives upon a firm and organized footing came to be made !! For, the British Government deliberately ruled that education was to be a preserve for the higher classes. Lest this fact should be regarded as a fiction, attention is invited to the following extracts from the Report of the Board of Education of the Bombay Presidency for the year 1850-51 :—

> "**Paragraph 5th.— System adopted by the Board based on the views of Court of Directors**.—Thus the Board of Education at this Presidency having laid down a scheme of education, in accordance with the leading injunctions of Despatches from the Honourable Court, and founded not more on the opinions of men who had been attentively considering the progress of education in India such as the Earl of Auckland, Major Candy and others, than on the openly declared wants of the most intelligent of the natives themselves, the Board, we repeat, were informed by your Lordships predecessor in Council that the process must be reversed."

"**Paragraph 8.—Views of Court on the expediency of educating the upper classes**.—Equally wise, if we may be permitted, to use the expression, do the indications of the Hon. Court appear to us to be as to the quarters to which Government education should be directed, and specially with the very limited funds which are available for this branch of expenditure. The Hon. Court write to Madras in 1830 as follows: "The improvements in education, however, which most effectively contribute to elevate the moral and intellectual condition of a people, are those which concern the education of the higher classes—of the persons possessing leisure and natural influence over the minds of their countrymen. By raising the standard of instruction amongst these classes, you would eventually produce a much greater and more beneficial change in the ideas and the feelings of the community than you can hope to produce by acting directly on the more numerous class. You are, moreover, acquainted with our anxious desire to have at our disposal a body of natives qualified by their habits and acquirements to take a larger share and occupy higher situations, in the civil administration of their country than has been hitherto the practice under our Indian Government; ' Never-the-less, we hear on so many sides, even from those who ought to know better of the necessity and facility for educating the masses for diffusing the arts and sciences of Europe amongst the hundred or the hundred and forty millions (for numbers count for next to nothing) in India, and other like generalities indicating cloudy notions on the subject, that a bystander might almost be tempted to suppose the whole resources of the State were at the command of Educational Boards, instead of a modest pittance inferior in amount to sums devoted to a single establishment in England.

"**Paragraph 9.—Retrospect of principal Educational facts during the last ten years necessary**.—The arguments adduced in the few last paragraphs appear to show that a careful examination of the real facts, and an analysis of the principal phenomena which have displayed themselves in the course of educational proceedings in die Presidency, would not be without their uses, if made with sufficient industry and impartiality to ensure confidence, and with a firm determination to steer clear of bootless controversy and all speculative inquiries. The present epoch, also, appears especially to commend itself for such a retrospect, as in 1850 the second decennial period commenced, during which the Schools of the Presidency have come under exclusive control of a Government Board ; and it is obvious that as a considerable body of information ought now to have been accumulated, and as the majority of the present members have had seats at the Board during the greater portion of that time, they would fain hope that by recording their experience, they may shed some light on certain obscure but highly interesting questions, which are certain to arise from time to time before their successors at this Board.

"Paragraph 10.—A uniform system developing itself spontaneously both in Bengal and Bombay.—We now proceed to give as minute a detail as comports with our limits, of the principal educational facts which have forced themselves upon our notice, and we think it will clearly appear, when those facts are duly appreciated, that many of the disputed questions, which arise in the Indian field of education, will be seen to solve themselves and that a system is generally evolving itself in other Presidencies as well as in Bombay, which is well suited to the circumstances of the country, and which, as the growth of spontaneous development, denotes that general causes are at work to call it forth.

"**Paragraph 11.—Statistics of education in Bombay**.—In the return on the following page, a comparative view is given of the number of schools and of pupils receiving education under Government at the period when the Establishments first came under the control of the Board, in 1840 and in April 1850. It shows, in the latter period, an addition of four English and 83 vernacular schools and a general increase in pupils of above a hundred per cent. The total number receiving Government education at present is 12,712 in die following proportion :—

English Education	..	..	..	1,699
Vernacular Education	..	..	..	10,730
Sanskrit Education	..	..	..	283

(comparison from tables: in 1840 there were 97 schools, number of pupils 5,491 ;. number of schools 185 and number of pupils 12,712).

"**Paragraph 12.— Same Subject.**—But the population of the Bombay Presidency is now calculated by the most competent authorities to amount to ten millions. Now on applying the rule of statistics deduced from the Prussian census as noticed in a former Report (1842-43 page 26) a population of this amount will be found to contain no fewer man 900,000 male children between the ages of seven and fourteen years and of course, fit subjects for school. It follows, therefore, that Government at this Presidency has not been able to afford an opportunity for obtaining education to more than one out of every sixty nine boys of me proper school going age.

"**Paragraph 13.—Same Subject**.—Further, it is admitted that education afforded in the Vernacular School is far from efficient. A great portion of the strictures of Mr. Willoughby's Minute is directed against the defective character and insignificant results of these schools. The Board, not only acknowledge this fact, but they have been studious to point it out prominently for many years past, and indeed, in the opinion of some competent observers, have drawn too unfavourable a picture of the vernacular schools. But what are the obvious remedies for the defects indicated ? Mr. Willoughby describes them very correctly :—"a superior class of school masters, normal schools, more efficient supervision, additions to the vernacular literature." These are all subjects

however, which have occupied the attention of the Board for many years past, and as to which not a step can be made in advance without additional expenditure. But we are given to understand from the letter of your Lordship in council that "it is not probable that the Government will have the power, for a considerable time to come, to afford the Board additional pecuniary assistance."

"**Paragraph 14.—Conclusion that no means exist for educating the masses:** It results most clearly from these facts that if sufficient funds are not available to put 175 Vernacular schools into a due state of organisation, and to give a sound elementary education to 10,730 boys, all question as to educating "the masses" the "hundred and forty millions" the 900,000 boys in the Bombay Presidency disappears. The object is not one that can be attained or approximated to by Government ; and Educational Boards ought not to allow themselves to be distracted from a more limited practical field of benevolence.

"**Paragraph 15.— Views of Court of Directors as to the best method of operation with limited means.**—The Hon'ble Court appear to have always kept the conclusion which has been arrived at in the last paragraph very distinctly in view. Perceiving that their educational efforts to improve the people could only be attempted on a very small scale, they have deemed it necessary to point out to their different Governments the true method of producing the greatest results with limited means. We have already cited their injunctions to the Madras Government on the head, (Para 7) and their despatch to the Government on the same date enforce sentiment of exactly the same import:— "It is our anxious desire to afford to the higher classes of the Natives of India the means of instruction in European sciences and of access to the literature of civilised Europe. The character which may be given to the classes possessed of leisure and natural influence ultimately determines that of the whole people."

"**Paragraph 16.—Inquiry as to upper classes of India.**— It being then demonstrated that only a small section of the population can be brought under the influence of Government education in India, and the Hon'ble Court having in effect decided that this section should consist of the "upper classes" it is essential to ascertain who these latter consist of. Here it is absolutely necessary for the European inquirer to divest his mind of European analogies which so often insinuate themselves almost involuntarily into Anglo-Indian speculations. Circumstances in Europe, especially in England have drawn a marked line, perceptible in manners, wealth, political and social influence, between the upper and lower classes. No such line is to be found in India, where, as under all despotisms the will of the Price was all mat was requisite to raise men from the humblest condition in life to the highest station, and where consequently great uniformity in manners has always prevailed.

A begger, according to English notions, is fit only for the stocks or compulsory labour in the workhouse ; in India he is a respectable character and worthy indeed of veneration according to the Brahminical theory, which considers him as one who has renounced all the pleasures and temptations of life for the cultivation of learning and undisturbed meditation of the Deity.

"**Paragraph 17.—Upper classes in India**.—The classes who may be deemed to be influential and in so far the upper classes in India may be ranked as follows:—

1st.—The landowners and Jaghirdars, representatives of the former feudatories and persons in authorities under Native powers and who may be termed the Soldier class.

2nd.—Those who have acquired wealth in trade or commerce or the commercial class.

3rd.—The higher employees of Government.

4th.—Brahmins, with whom may be associated, though at long interval, those of higher castes of writers who live by the pen such as Parbhus and Shenvis in Bombay, Kayasthas in Bengal provided they acquire a position either in learning or station.

"Paragraph 18.—Brahmins, the most influencial.—Of these four classes, incomparably the most influencial, the most numerous, and on the whole easiest to be worked on by the Government, are the latter. It is a well-recognized fact throughout India that the ancient Jaghirdars or Soldier class are daily deteriorating under our rule. Their old occupation is gone, and they have shown no disposition or capacity to adopt new one, or to cultivate the art of peace. In the Presidency, the attempts of Mr. Elphinstone and his successors to bolster up a landed aristocracy have lamentably failed ;. and complete disconfiture has hitherto attended all endeavours to open up a path to distinction through civil honours and education, to a race to whom nothing appears to excite but vain pomp and extravagance, of the reminiscences of their ancestors' successful raids in the plains of Hindusthan". Nor among commercial classes, with a few exceptions, is mere much greater opening for the influences of superior education. As in all countries, but more in India than in the higher civilized ones of Europe, the young merchant or trader must quit his school at an early period in order to obtain the special education needful for his vocation in the market or the counting house. Lastly, the employees of the State, though they possess a great influence over the large numbers, who come in contact with Government, have no influence, whatever, with the still larger numbers who are independent of Government ; and, indeed, they appear to inspire the same sort of distrust with me public as Government functionaries in England, who are often considered by the vulgar as mere hacks of the State.

"**Pharagraph 19.—Poverty of Brahmins**.—The above analysis, though it may appear lengthy, is nevertheless, indispensible, for certain important conclusions deducible from it. First, it demonstrates that the influencial class, whom the Government are able to avail themselves of in diffusing the seeds of education, are the Brahmins and other high castes Brahmins proxmi. But the Brahmins and these high castes are, for the most part, wretchedly poor: and in many parts of India, the term Brahmin is synonymous with "beggar."

"Paragraph 20.—Wealthy classes will not at present support superior education.—We may see, then, how hopeless it is to enforce what your Lordship in council so strongly enjoined upon us in your letter of the 24th April 1850—what appears, *prima facie,* so plausible and proper in itself—what in fact, the Board themselves have very often attempted, *viz,* the strict limitation of superior education "to the wealthy, who can afford to pay for it, and to youths of unusual intelligence." The invariable answer the Board has received, when attempting to enforce a view like this, has been, that the wealthy are wholly indifferent to superior education and that no means for ascertaining unusual intelligence amongst the poor exist, until their faculties have been tested and developed by school training. A small section, from among the wealthier classes, is no doubt displaying itself, by whom the advantages of superior education are recognized, it appears larger in Bengal, where education has been longer fostered by Government, than in Bombay, and we think it inevitable that such class must increase, with the experience that superior attainments lead to distinction, and to close intercourse with Europeans on the footing of social equality ; but as a general proposition at the present moment, we are satisfied that the academical instruction in the arts and sciences of Europe cannot be based on the contributions, either of students or of funds, from the opulent classes of India.

"**Paragraph 21.—Question as to educating low castes**.—The practical conclusion to be drawn from these facts which years of experience have forced upon our notice, is that a very wide door should be opened to the children of the poor higher castes, who are willing to receive education at our hands. But here, again, another embarassing question arises, which it is right to notice: If the children of the poor are admitted freely to Government Institutions, what is there to prevent all the despised castes—the Dheds, Mahars etc., from flocking in numbers to their walls ?

"**Paragraph 22.—Social Prejudice of the Hindus**.—There is a little doubt, that if a class of these latter were to be formed in Bombay, they might be trained, under the guiding influence of such Professors and masters as are in the service of the Board, into men of superior intelligence to any in the community; and with such qualifications, as they would then possess, there would be nothing to prevent their aspiring to the highest offices open to Native talent—to Judgeship the Grand Jury, Her

Majesty's Commission of the Peace. Many benevolent men think, it is the height of illiberality and weakness in the British Government, to succumb to the prejudices, which such appointments would excite into disgust amongst the Hindu community, and that an open attack should be made upon the barriers of caste.

"Paragraph 23.—Wise observations of the Hon. Mount Stuart Elphinstone cited.— But here the wise reflections of Mr. Elphinstone, the most liberal and large minded administrator, who has appeared on this side of India, point out the true rule of action. "It is observed" he says, "that the missionaries find the lowest castes the best pupils; but we must be careful how we offer any special encouragement to men of that description ; they are not only the most despised, but among the least numerous of the great divisions of society, and it is to be feared that if our system of education first took root among them it would never spread further, and we might find ourselves at the head of a new class, superior to the rest in useful knowledge, but hated and despised by the castes to whom these new attainment would be desirable, if we were contented to rest our power on our army or on the attachment of a part of the population but is inconsistent with every attempt to found it on a more extended basis."

5. It is, therefore obvious, that if no schools were opened for Depressed classes before 1855 in the Bombay Presidency, it was because the deliberate policy of the British Government was to restrict the benefits of education to the poor higher castes, chiefly the Brahmins. Whether this policy was right or wrong is another matter. The fact, however, is that during this period the Depressed classes were not allowed by Government to share in the blessings of education.

II.—From 1854 to 1882

6. In their Despatch No. 49 of 19th July 1854, the Court of Directors observed :—

"Our attention should now be directed to a consideration, if possible, still more important, and one which has hitherto, we are bound to admit, too much neglected, namely, how useful and practical, knowledge suited to every station in 1ife, may be best conveyed to the great mass of the people who are utterly incapable of obtaining any education worthy of the name by their own efforts ; and we desire to see the active measures of Government more especially directed, for the future, to this object, for the attainment of which, we are ready to sanction a considerable increase of expenditure."

This despatch is very rightly regarded as having laid the foundation of mass education in this country. The results of this policy were first examined by the Hunter Commission on Indian Education in 1882. The following figures show what was achieved during the period of 28 years.

PRIMARY EDUCATION

1881-82

	No. of scholars at School	Per cent on total
Christians	1,521	.49
Brahmins	63,071	20.17
Other Hindus	202,345	64.69
Mohammedans	39,231	12.54
Parsis	3,517	1.12
Aborginal and Hill Tribes	2,713	.87
Low caste Hindus	2,862	.87
Jews and others	373	.12

SECONDARY EDUCATION

1881-82

		Middle Schools		High Schools	
		No. of scholars at schools	P. C. on total No. of scholars	No. of scholars at schools	P. C. on total No. of scholars
Christians ..		1,429	12.06	111	2.26
Brahmins ..		3,639	30.70	1,978	40.29
Other Hindus	Cultivators	624	5.26	140	2.85
	Low Castes	17	.14	..	..
	Other Castes	3,823	32.25	1,573	32.04
Mohammedans ..		687	5.80	100	2.04
Parsis ..		1,526	12.87	965	19.66
Aboriginal and Hill Tribes		6	.05	..	..
Others (including Jews etc.)		103	.87	92	.86

COLLEGIATE EDUCATION
1881-82

		No. of Scholars	P. C. on total No. of Scholars
Christians		14	3
Brahmins		241	50
Other Hindus	Cultivators	5	1
	Low Castes	0	0
	Other Castes	103	21.3
Mohammedans		7	1.5
Parsis		108	21.5
Aboriginal and Hill Tribes		0	0
Others (including Jews etc.)		2	0.4

7. What do these figures show ? They show that although mass education was the policy of the Government, the masses were as outside the pale of education as they were before the year 1854 and that the lowest and aboriginal classes of the Hindus still remained lowest in order of education; so much so, that in 1881-82, there was no student from that community either in the High Schools or in the Colleges of this Presidency. What can this failure to bring the Depressed Classes to the level of the rest in the matter of education be due to ? To answer this question, it is necessary again to go into the history of the educational policy of the Government of this Presidency.

8. The Despatch of the Court of Directors of the year 1954, for the first time recognised after a lapse of full 40 years that the duty of the State was to undertake the education of the great mass of the people. But there were still die-hards, who had great misgivings as to the wisdom of the principle laid down in that Despatch and who were agitating for a reversal of that policy. The fears of dire consequences to the British Rule arising from elevating the Backward Classes above their station in life, still haunted men like Lord Ellenborough, President of the Board of

Control, who in a letter to the Chairman of the Court of Directors dated 28th of April 1858, did not hesitate to strike the following note of caution :—

> "Gentlemen:—Many letters have been lately before me, reviewing the state of education in different parts of India, under the instructions sent by the Court of Directors in 1854, and I confess, that they have not given me the impression that the expected good has been derived from the system which was then established, while all the increase of charge which might have been expected, appears to be in progress of realization.
>
> * * * *
>
> "Paragraph 11:—I believe, we rarely, if even induce parents above the lower class to send their children to our schools, and we should practically, if we succeeded in intending education as we desire, give a high degree of mental cultivation to the labouring class, while we left the more wealthy in ignorance.
>
> "Paragraph 12:—This result would not tend to create a healthy state of society. Our Government could not offer to the most educated of the lower class the means of gratifying the ambition we should excite.
>
> "Paragraph 13:—We should create a very discontented body of poor persons, having, through the superior education we had given to them, a great power over the mass of the people.
>
> "Paragraph 14 :—Education and civilization may descend from the higher to the inferior classes, and so communicated may impart new vigour to the community, but they will never ascend from the lower classes to those above them ; they can only, if imparted solely to the lower classes, lead to general convulsion, of which foreigners would be the first victims.
>
> "Paragraph 15:—If we desire to diffuse education, let us endeavour to give it to the higher classes first.
>
> "Paragraph 16:—These are but two ways of doing this—by founding colleges to which the higher classes alone should be admitted, and by giving in the reorganization of the army, commissions at once, to such sons of native gentlemen as may be competent to receive them."

9. This antipathy of the European officers towards the untouchable classes was finally corrected by the Secretary of State for India in his despatch of 1859, which again reiterated the responsibility of Government for mass education.

10. Singular as it may appear, the recognition by the Government of its responsibility for mass education conferred upon the Depressed classes a benefit only in name. For, although, schools

were opened for the masses in the various districts, the question of the admission of the Depressed classes to these schools had yet to be solved. Such a question did practically arise in the year 1856. But the decision of the Government was not favourable to the Depressed classes as will be seen from the following extracts from the Report of the Director of Public Instruction for the Bombay Presidency for the year 1856-57 :—

> "Paragraph 177.—Schools of Low castes and wild tribes.—There are no low class schools established directly by Government and the Supreme Government has expressed disapproval of such schools. The ordinary schools entirely supported by the state are in theory open indifferently to all castes. In the course of observation of my Report 1855-56 the Government issued the following order:—"The only case as yet brought before Government in which the question as to the admissions of the pupils of the lowest class to Government schools has been raised was that of a Mahar boy on whose behalf a petition was submitted in June 1856, complaining that though willing to pay the usual schooling fee, he had been denied admission to the Dharwar Government School.
>
> "On this occasion, Government felt a great practical difficulty which attended the adjudication of a question in which their convictions of abstract right would be in antagonism to the general feelings of the mass of the natives, for whose enlightenment, to the greatest possible extent, the Government Educational Department has been established; and it was decided, as will appear from the Resolution* passed at the time with some hesitation, that it would not be right, for the sake of single individual, the only Mahar who had ever come forward to beg for admission into a school attended only by the pupils of castes and to force him into association with them, at the probable risk of making the institution practically useless for the great mass of natives".

*Text of the Resolution passed by Government on the 21st July 1856 :—

1. The question discussed in the correspondence is one of very great practical difficulty.
2. There can be no doubt that the Mahar petitioner has abstract justice on his side; and Government trust that the prejudices which at present prevent him from availing himself of existing means of education in Dharwar may be ere long removed.
3. But Government are obliged to keep in mind that to interfere with the prejudices of ages in a summary manner, for the sake of one or few individuals, would probably do a great damage to the cause of education. The disadvantage under which the petitioner labours is not one which has originated with this Government, and it is one which Government summarily remove by interfering in his favour, as he begs them to do.

The proceedings of the Government of Bombay in this matter were noticed in the following terms by the Government of India, in a letter No. 111 dated 23rd January 1857 :—

> "Governor General in Council thinks it very probable that the Bombay Government has acted wisely in the matter; but it desires me (i. e. Secretary to the Government of India) to say that the boy would not have been refused admission to any Government school in the Presidency of Bengal".*

On receipt of this letter, it was resolved that Government of India should be assured that this Government would be most unwilling to neglect any means of rendering the schools throughout the country less exclusive than they practically are in the matter of caste; provided this could be effected without bringing the Government school into general disrepute, and thus destroying their efficiency and defeating the object for which they were intended. It was also determined that an enquiry should be made as to the practical working of the principle which was said to prevail in Bengal as affecting the general usefulness of the Government schools.

11. Inquiries as to the practice prevalent in Bengal revealed that the Bengal authorities, contrary to the supposition of the "Government of India" had left it to the District Committees of Instructions to grant or refuse admittance to candidates of inferior castes, with reference to the state of local native feeling in each case. The result of this was that the Depressed classes were left in the cold, because the touchable classes would not let them sit at the fire of knowledge which the Government had lit up in the interest of all its subjects.

*In a Despatch No. 58 dated April 28th 1858, the Court of Directors passed the following order on this subject:—

> "The educational institutions of Government are intended by us to be open to all classes, and we cannot depart from a principle which is essentially sound, and the maintenance of which is of first importance. It is not impossible that, in some cases, the enforcement of the principle may be followed by a withdrawal of a portion of the scholars ; but it is sufficient to remark that those persons who object to its practical enforcement will be at liberty to withhold their contributions and apply their funds to the formation of schools on a different basis".

12. Under these circumstances, mass education as contemplated by the Despatch of 1854 was in practice available to all except the Depressed classes. The lifting of the ban on the education of the Depressed classes in 1854 was a nominal affair only. For, although the principle of non-exclusion was affirmed by the Government, its practical operation was very carefully avoided; so that, we can say, that the ban was continued in practice as before.

The only agency which could take charge of the education of the Depressed classes was that of Christian Missionaries. In the words of Mount Stuart Elphinstone they "found the lowest classes the best pupils". But the Government was pledged to religious neutrality and could not see its way to support missionary schools, so much so that no pecuniary grant was made in this Presidency to any missionary school in the early part of this period although the Educational Despatch of 1854 had not prohibited the giving of grants to missionary schools.

13. To find a way out of this *impasse* the Government adopted two measures: (1) the institution of separate Government schools for low caste boys, and (2) the extention of special encouragement to missionary bodies to undertake their education by relaxing the rules of grants-in-aid. Had these two measures not been adopted, the education of the Depressed classes would not have yeilded the results, most meagre as they were, at the stock-taking by the Hunter Commission in 1882.

III—From 1882 to 1923

14. After the year 1882, the year 1923 forms the next land mark in the educational history of the Bombay Presidency. That year marks the transfer of primary education from the control of Provincial Governments to the control of local bodies. It will therefore be appropriate to take stock of the position as it stood in 1923. The position of the different communities in the Bombay Presidency in 1923 in the matter of educational advancement may be summed up in a tabular form as follows :—

Classes* of population in the Presidency	Order in respect of population	Order in respect of education		
		Primary	Secondary	Collegiate
Advanced Hindus ..	4th	1st	1st	1st
Intermediate Hindus ..	1st	3rd	3rd	3rd
Backward Hindus ..	2nd	4th	4th	4th
Mahomedans	3rd	2nd	2nd	2nd

15. From this table, one notices a great disparity in the comparative advancement of these different communities in the matter of education. Comparing these classes of people according to the order in which they stand in respect of their population and according to the order in which they stand in respect of their educational progress, we find that the Intermediate class, which is first in order of population is third in order of college education, third in order of secondary education and third in order of primary education. The Depressed classes who are second in order of population, stand fourth i.e. last in order of college education, last in order of secondary education and last in order of primary education. The Mahomedans who are third in order of population are second in order of college education, second in order of secondary education and second in order of primary education ; while the "Advanced Hindoos" who occupy the fourth place in order of population stand first in order of college education, first in order of secondary education and first in order of primary education. From this we can safely say that in this respect there has been no improvement over the situation as it stood in 1882 relatively speaking.

16. The above statement which is based upon the Report of the Director of Public Instruction, Bombay Presidency for the year 1923-24 merely reveals the disparity that exists in the educational

* The Education Department of the Government of Bombay has divided the population of this Presidency for departmental purposes into four different classes. In one of them are put the Brahmins and allied castes, who are collectively called "Advanced Hindus". The Marathas and allied castes are put in a separate class called the "Intermediate Hindus". The rest of the population comprising the Depressed classes ;. hill tribes and the criminal tribes are placed in a class by themselves and are designated by the term "Backward class". To these three classes there is to be added a fourth class which comprises the Mahomedans of the Presidency and Sind.

advancement of the different communities. But the disparity in the level of education among the different communities would be a very small matter if it be not very great. We can form no important conclusion unless we know the degree of disparity. To make this position clear from this point of view, the following table is presented:—

TABLE

Classes of Population	Primary Education, Students per 1000 of the population of the class	Secondary Education, Students per 100,000 of the population	College Education, Students per 200,000 of the population
Advance Hindus ..	119	3,000	1,000
Mahomedans ..	92	500	52
Intermediate class ..	38	140	24
Backward class ..	18	14	Nil (or nearly one if at all).

17. The above figures give the lengths, as it were, by which each community is ahead of the rest in the matter of primary, secondary and collegiate education. They reveal a range of disparity between the different communities in this Presidency which shows that the position of some of the communities in the matter of education is most shocking. From the statistics as given above, two facts stand out to be indisputable. (1) That the state of education of the Backward classes in this Presidency is deplorable. In the matter of population they occupy a place as high as second. But in the matter of Education, they occupy a place which is not only last but which also is the least; (2) That the Muhammedans of the Presidency have made enormous strides in education ; so much so that within the short span of 30 years, they have not only stolen a march over other communities such as the Intermediate and the Backward class, but have also come close to the Brahmins and allied castes.

18. What can this be due to ? To the policy of unequal treatment adopted by the Government must again be our reply to this ever present question. How unequal was the treatment of the two classes will be evident from the following extracts from the Quinquennial Reports on Education. With regard to the treatment of the Mahomedans in the matter of education, the following observations in the third Quinquennial Report (1892-96) are noteworthy:—

> "Concerning the figures for Mahomedan Education in Bombay ..... the Director remarks that the increase would have been larger "but for adverse circumstances". It has long been recognized in Bombay that Mahomedans make a larger use of Public Institutions than the rest of the population ..... On the general question of what has been done to encourage Mahomedan education, the Director writes:—
>
> > "In the first place, a Mahomedan officer is appointed to every District, either as Deputy or Assistant Deputy Inspector; and we have three Mahomedan graduates as Deputies, at Kaira, Sholapur, and Hyderabad, while a fourth has been drafted into the higher grades of the Revenue Department. There is thus, not a District where the staff is out of touch with the Mahomedan population. Again at Bombay, Karachi and Junagadh (a Muhammadan State in Kathiawar), special efforts have been made to provide High Schools for Muhammadans with low fee rates, and smaller schools have been opened by other Anjumans (Muhammadan associations) elsewhere. The Department also provides for their benefit, special standards and maintains special schools in certain localities, and reserves for them one-third of the Provincial and Local Boards scholarships. Then, there are the special scholarships founded by Khan Bahadur Kazi Shahbuddin (at one time Diwan of Baroda); and in Sindh, a certain number of food scholarships have been given by the heir of the Native State of Khairpur for students attending in Arts College. (I had great difficulty in filling these up last year, though they are of the value of Rs. 25 a month). In Primary schools, Muhammadans are very liniently treated in the matter of fees. They are encouraged to come to the Training Colleges by special rules which (regime)* from them an easier test than from Hindus; The Joint Schools Committee at Bombay has lately made special efforts to encourage Muhammadan education by the appointment of a Mahommadan Deputy Inspector ....."

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* The word may be 'require'—ed.

19. Compare with this the observations regarding the education of the Depressed classes in the fifth Quinquennial Report (1902-1907):

> "959. Bombay—In the Central Division of Bombay, the low caste children are admitted free into schools and receive presents in the form of books, slates etc ..... In Kathiawar only three children of the Depressed castes are receiving education. In the Southern division there are 72 special schools or classes of them, most of which are under unqualified teachers."

20. This unequal treatment has its origin in the recommendations of the Hunter Commission. How partial was the Hunter Commission to the Mahomedans will be evident, if we compare the recommendations it made in their behalf to those it made in the interests of the Depressed classes. With respect to the Mahomedans the Commission made seventeen recommendations of which the following are worthy of note:—

> (1) that the special encouragement of Mahomedan education be regarded as a legitimate charge on local, on Municipal, and on Provincial funds.
>
> (7) that higher English education for Mahomedans, being the king of education in which that community needs special help, be liberally encouraged.
>
> (8) that, where necessary, graduated system of special scholarships for Mahomedans be established to be awarded (a) in primary schools, and tenable in middle schools ; (b) in middle schools, and tenable in high schools; (c) on the results of Matriculation and First Arts examinations, and tenable in colleges also.
>
> (9) that in all classes of schools maintained from public funds, a certain proportion of free studentship be expressly reserved for Mahomedan students.
>
> (10) that in places where educational endowments for the benefit of Mahomedans exist and are under the management of Government, the funds arising from each endowments be devoted to the advancement of education among the Mahomedans exclusively.
>
> (11) that where Mahomedans exist, and are under the management of private individuals or bodies, inducements by liberal grants-in-aid be offered to them to establish English leaching schools or colleges on the grants-in-aid system.
>
> (12) that, where necessary, the Normal Schools or classes for the training of Mahomedan teachers be established.

(16) that Mahomedan Inspecting Officers be employed more largely than hitherto for the inspection of primary schools for Mahomedans.

(17) that the attention of Local Governments be invited to the question of the proportion in which patronage is distributed among educated Mahomedans and others.

21. Every one of these recommendations made by the Hunter Commission was necessary in the interests of the Depressed classes also. But when we come to analyse the recommendations made by the Commission in The interest of the Backward classes, we do not find them directing that education of the Backward Classes be regarded a legitimate change on Government funds, that scholarships and proceedings be reserved for them, that special inspecting staff be kept to look after their educational needs or that public patronage be given to them by way of encouraging the growth of education amongst them. All we find the Commission saying is that (1) the principle that "no boy be refused admission to a Government College or school merely on the ground of caste", be now reaffirmed as a principle and be applied with due caution to every institution, not reserved for special races, which is wholly maintained at the cost of public funds, whether provincial, municipal or local. (2) that the establishment of special schools or classes for children of low castes be liberally encouraged in places where there are a sufficient number of such children to form separate schools or classes and where the schools already maintained from public funds do not sufficiently provide for their education. "As a matter of fact the recommendations made by the Commission for the Mahomedans were far more necessary in the interests of the Backward classes than in the interests of the Mahomedans." For even the Hunter Commission, presided as it was by a chairman of pronounced sympathies for the Mahomedans, had to admit that "the inquiries made in 1871-73 went to prove that except in the matter of the higher education, there had been a tendency to exaggerate the backwardness of the Muhamadans." Notwithstanding this the only recommendations made by the Hunter Commission were the two mentioned above. Even these two recommendations made by the Commission regarding the Depressed classes were not calculated to do much good. They were bound to be futile. The reaffirmation of the principle even

if it be for the fifth time was useless. For under the proviso inserted by the Commission, the enforcement was to be avoided in practice. Similarly, the opening of the separate schools for the Depressed classes was hardly possible, which again was bound to be sterile. Separate schools involving additional expense could hardly be acceptable to a Government to which primary education was a task. Besides, the proviso, that such schools should be opened where Backward classes were in large numbers, was sufficient to negative the recommendations simply because in rural parts the Backward classes can seldom be found to be living in one locality in large numbers.

22. It is difficult to understand why the Hunter Commission paid such a scant attention to the educational needs of the Backward classes. If it felt necessary to be generous towards the Mahomedans, it should have at least seen that it was just to the Backward classes who were far behind the Mahomedans in education, wealth and social status. Once the Hunter Commission had thrown the Depressed classes into the background, they remained there and the Government never paid any attention to them. As an example of this neglect, attention may be drawn to the Resolution of the Government of India in the Department of Education dated Delhi the 21st February 1923. It was one of the most important resolutions ever issued by the Government of India in which they decided to assist local Government by means of large grants from imperial revenues as funds became available, to extend comprehensive systems of education in the several provinces. In that resolution, they were particular to point out to the provincial Governments, the educational needs of "Domiciled community" and the Mahomedan community. But they had not a word to say in the whole Resolution about the Backward classes. The Bombay Government readily accepted the suggestion and appointed in 1913 a Mahomedan on Education Committee to make recommendations for the promotion of education among the Mahomedans. One feels righteous indignation against such criminal neglect on the part of the Government, particularly when, it is realized that the large grants given by the Government of India after 1913, were given by way of

fulfilment of the declaration made by His Most Gracious Imperial Majesty, the King Emperor, in replying to the address of the Calcutta University on the 6th January, in which he said :—

> "It is my wish that there may be spread over the land a network of Schools and Colleges, from which will go forth loyal and manly and useful citizens, able to hold their own industries and agriculture and all the vocations in life. And it is my wish too, that the homes of my Indian subjects may be brightened and their labour sweetened by the spread of knowledge with all that follows in its train, a higher level of thought, of comfort and health. It is through education that my wish will be fulfilled, and the cause of education in India will ever be very close to my heart."

IV

What about social Reform under the British Government ?

It was Raja Sir T. Madhavrao, a very prominent and progressive Hindu of the last generation, who said:—

> "The longer one lives, observes, and thinks, the more deeply does he feel that there is no community on the face of the earth which suffers less from political evils and more from self-inflicted or self-accepted or self-created, and therefore avoidable evils, than the Hindu Community."

Leaving aside the question of the comparative cost of the observation, there can be no doubt that Hindu Society suffers from social evils as no other community does.

Mahadeo Govind Ranade, another venerable name among earnest social reformers has made another and equally important observation, emphasizing another aspect of the Hindu Community :—

> "Mere considerations of expediency or economical calculations of gains or losses can never move a community to undertake and carry through social reforms, especially with a community like ours, so spellbound by custom and authority. Our people feel, and feel earnestly, that some of our social customs are fraught with evil; but as this evil is of a temporal character, they think that it does not justify a breach of commands divine, for such breach involves a higher penalty. The truth is, the orthodox society has lost its power of life, it can initiate no reform nor sympathise with it."

In other words all the social evils are based on religion. A Hindu man or woman, whatever he does, he does as a religious observance. A Hindu eats religiously, drinks religiously, bathes religiously, dresses religiously, is born religiously, is married religiously and is burned religiously. His acts are all pious acts. However evil they may be from a secular point of view, to him, they are not sinful because they are sanctioned and enjoined by his religion. If any one accuses a Hindu of Sin, his reply is, 'If I sin, I am sinning religiously.'

Society is always conservative. It does not change unless it is compelled to and that too very slowly. When change begins, there is always a struggle between the old and the new, and the new is always in danger of being eliminated in the struggle for survival unless it is supported. The one sure way of carrying through a reform is to back it up by law. Without the help of legislation, there can never be any reform in any evil. The necessity of legislation is very great when the evil to be reformed is based on religion.

What is the sum total of legislation in favour of social reform under the British Government ? The record of the British Government, in the matter of social reform, is to say the least, very halting and very disappointing. In the course of 150 years, there are just six social evils which have been subjected to Legislation.

The first piece of Social Legislation which the British undertook, is contained in **Bengal Regulation XXI of 1795.** It is a regulation for Preventing the Brahmins in the Province of Benares establishing Koorhas, wounding or killing their female relations or children or sitting Dhurna and for preventing the Tribe of Raj Koomars in that Province killing their female children. It enacted as follows :—

Preamble

I. The reverence paid by the Hindoos to Brahmins, and the reputed inviolability of their persons, and the loss of, or prejudice to cast(e), that

ensues from proving the casue of their death, have in some places in the province of Benares, and more especially in the pergunnahs of Kuntit and Budhoe been converted by some of the more unlearned part of them, into the means of setting the laws at defiance, from the dread and apprehensions of the persons of the Hindoo religion, to whose lot it must frequently fall to be employed, in enforcing against such Brahmins any process or demands on the part of Government. The devices occasionally put in practice under such circumstances by these Brahmins, are lacerating their own bodies, either more or less slightly, with knives or razors; threatening to swallow, or, sometimes actually swallowing poison, or some powder which they declare to be such; or, constructing a circular enclosure called a *koorh,* in which they raise a pile of wood or of other combustible and betaking themselves to fasting, real or pretended, place within the area of the koorh, an old woman, with a view to sacrifice her by setting fire to the koorh, on the approach of any person to serve them with any process, or to exercies coercion over them on the part of Government, or its delegates. These Brahmins likewise, in the event of their not obtaining relief within a given time, for any loss or disappointment that they may have justly or unjustly experienced, also occasionally bring out their women or children, and causing them to sit down in the view of the peon who is coming towards them on the part of Government, or its delegates, they brandish their swords, and threaten to behead, or otherwise slay, these females, or children, on the nearer approach of the peon ; and there are instances, in which, from resentment at being subjected to arrest or coercion, or other molestation, they have actually not only inflicted wounds on their own bodies, but put to death with their swords, the females of their families, or their own female infants, or some aged female, procured for the occasion. Nor are the women always unwilling victims ; on the contrary, from the prejudices in which they are brought up, it is supposed that in general they consider it incumbent on them to acquiesce cheerfully in the species of self-devotement, either from motives of mistaken honor, or of resentment and revenge, believing that after death they shall become the tormentors of those who are the occasion of their being sacrificed. On similar principles, these Brahmins, to realize any claim or expectation, such as the recovery of a debt, or for the purpose of extorting some charitable donation, frequently proceed either with some offensive weapon, or with poison, to the door of another inhabitant of the same town or village, and take post there in the manner called Dhurna ; and it is understood, according to the received opinions on this subject, that they are to remain fasting in that place until their object be attained ; and that it is equally incumbent on the party who is the occasion of such Brahmins thus sitting, to abstain from nourishment until the latter be satisfied. Until this is effected, ingress and egress to and from his house are also more or less prevented, as according to the received opinion, neither the one nor the other can be attempted, but at the risk of the Brahmin's wounding himself with the weapon, or swallowing the

powder or poison, with which he may have come provided. These Brahmins, however are frequently obliged to desist and are removed from sitting Dhuma by the officers of the courts of justice, without any ill consequence resulting it, having been found by experience, that they seldom or ever attempt to commit suicide, or to wound themselves or others, after they are taken into the custody of Government. The rules and measures adopted for putting a stop to these abuses, and for preventing the revival of the still more savage custom, which until within these few years, had been generally prevalent amongst the tribe of Rajkoomars inhabiting the borders of the province near Juanpore, of destroying their infant female children, by suffering them to perish for want of sustenance, are hereby enacted, with modifications, into a regulation.

Brahmins establishing a koorh, or preparing to maim, wound, or slaughter his women or children

II. Upon information in writing being preferred to the magistrate of the city or a zillah court, against any Brahmin or Brahmins, for establishing a *koorh,* or for being prepared to maim, wound, or slaughter his women or children, or any, or either of them, in the manner described in the preamble to this regulation, or in any other account or manner substantially similar thereto, on account of any subject of discontent, or any other account whatsoever; in such case, upon oath being made to the truth of the information, the Magistrate is immediately to address to the said Brahmin or Brahmins, a written notice in the Persian language and character, and in the Hindoostanee language and Nagree character, and under his official seal, which notice is to be served on him or them, by such relations, friends, or connections of the said Brahmin or Brahmins, as the magistrate may think fit, and have an opportunity of employing for the purposes and in default of such relations, friends, or connections of the said Brahmin or Brahmins, the magistrate is to cause the notice to be served by a single peon of the same religion ; and the notice shall require the said Brahmin or Brahmins to remove the *koorh,* and the women and people that may be placed in it; or to desist from any preparation twoards wounding or slaughtering the women or children according as either or both of these facts shall be charged in the information. The notice shall also contain a positive and encouraging assurance to the Brahmin or Brahmins in question, that on his or their complying with the principal exigence thereof, by removing the *koorh,* and the person or persons, or by desisting from any preparation to wound or slaughter the women and children, and thereon repairing (as such Brahmin or Brahmins may think fit) in person, or by Vakeel to the city or zillah court, proper enquiry shall be made concerning the dispute that may have given occasion to the act or acts thus prohibited. But if the issuing of the notice shall not have the effect of inducing the said Brahmin or Brahmins to comply with the exigence thereof, a written return to that purpose is to be made and attested by the

party or parties entrusted with the serving of it; and the magistrate is thereon to issue a warrant under his official seal and signature for the apprehension of the said Brahmin or Brahmins specifying the misdemeanor and contumacy with which he or they stand charged ; and the execution of the warrant is to be committed to peons of the Mahomedan religion, nor is any Hindoo to be sent on such duty. On the Brahmin or Brahmins against whom the warrant shall have been issued being brought before the magistrate, he or they are to be dealt with, in the mode prescribed in Section 5, Regulation IX, 1793, respecting persons charged with crimes or misdemeanors ; and if it shall appear to the magistrate on the previous enquiry, which by the said section he is himself directed to make, that the misdemeanor or misdemeanors charged, (that is, the constructing of the *koorh,* or being prepared to wound or slay the women or children, according as either or both of these acts shall have been charged) were actually committed, and that there are grounds for suspecting the prisoner or the prisoners respectively to have been concerned, either as a principal or an accomplice, in the perpetration of either or both of these acts ;. the magistrate shall cause him or them to be commuted to prison or held to bail, (according as the parties shall appear to have been principals or accomplices) to take his or their trial at the next session of the court or circuit, and shall bind over the informant or complainant, and the witnesses, to appear at the trial, in the manner prescribed in the aforesaid section.

Process of trial and the punishment to be inflicted, for the commission of the aforesaid offences

III. The court of circuit shall conduct the trial of Brahmin or Brahmins charged with the above offences, in the manner prescribed in Regulation IX, 1793 and XVI, 1795, in respect to the other offences, but as the Mahomedan law cannot adequately apply to offences of this local nature, it is therefore hereby provided and ordered, that where in me opinion of the court of circuit, the charge of being a principal in respect to the constructing of a *koorh,* or to having been prepared to wound or slay the women or children, shall be proved, the said court shall sentence the prisoner to the payment of a fine equal to the amount of his annual income, which is to be estimated according to the best information that they may be able to procure respecting it; and on proof to the court's satisfaction of the prisoner's being guilty only as an accomplice, he shall be sentenced to the payment of a fine equal to one-fourth of his estimated annual income. In all cases of parties being sentenced to the payment of such fines, they are to be committed to, and are to remain in jail until the amount thereof be paid, or until they shall have delivered to the court of circuit, or, after the said court's departure, to the magistrate, full and ample malzamines or security, to pay the same within six months from the date of their release ; and such parties, before their enlargement, either in consequence

of their having liquidated, or having entered into security for the payment for the fine imposed on them, shall deliver into the court of circuit, or, in their absence, to the magistrate, *faelzaminee,* or satisfactory security from one or more creditable persons, not to offend in like manner in future.

Authority reserved to the Nizamut Adawlut to mitigate such fines

IV. All sentences passed by the court of circuit under Section 3, without however any intermediate suspension of their execution, are to be transmitted within ten days after their being passed, to the Nizamut Adawlut, which court may order such mitigation and restitution of the fine or fines thereby imposed, as may be thought proper; but until the order be issued by the Nizamut Adawlut, the sentence of the court of circuit is to be considered in full force, and to be carried into effect accordingly.

Penalty for Brahmins absconding for whose apprehension the magistrate shall have issued a warrant under Section 2

V. In case any Brahmin or Brahmins, against whom the city or a Zillah magistrate may issue the warrant prescribed in Section 2, shall refuse to obey, or resist or cause to be resisted, the peons deputed to serve it, or escape after being taken by them into custody, or abscond, or shut himself or themselves up in any house or building, or retire to any place, so that the warrant cannot be served upon him or them, the magistrate shall issue a precept to the Collector, requiring him to cause to the nearest Tehsildar to attach the lands that such Brahmin or Brahmins may possess in property, or in mortgage, or in farm, or *Lakharaje*. The lands shall remain attached until he or they surrender, and the collections made during the attachment, after deducting such revenue as may fall due to Government, shall be accounted for, and paid to, the party against, or on account of, or in resentment to, whom, the *Koorh* was originally established, or the woman or women, or child or children, were to be wounded or slain, and after the surrender or apprehension of the Brahmin or Brahmins who set on the Koorh, or was or were prepared to wound or slay his or their women or children, or either of them, his or their lands shall be released ; but he or they shall be proceeded against, in respect to his or their lands shall be released; but he or they shall be proceeded against, in respect to his or their trial for the original offence or offences, as prescribed in Sections 3 and 4.

Collector to apply to the magistrate in case of Brahmins establishing a Koorh, or being prepared to kill or wound women or children, on account of any process from the revenue department

VI. In the event of any Brahmin or Brahmins establishing a *Koorh,* or preparing to wound or slay his or their women or children, or any or either of them, with a view to prevent the serving of any *Dustuck* or writ on him or them, for arrears of revenue by the local Tehsildar, or by the Collector

of Benares, in the manner in which by Regulation VI, 1795, they are respectively authorised to issue such *Dustucks,* if it be the Dustuck of the Tehsildar that is thus opposed, he is not, after being informed thereof, to persist in enforcing it, but is to report the case immediately to the Collector, accompanied by the written testimonies of the peon deputed to serve the *Dustuck* ; upon receipt of which information, or in case of his own original process being in like manner resisted, the Collector is to represent, through the Vakeel of Government, the amount of the balance due by such Brahmin or Brahmins, and the circumstances attending the issuing of his own or of his Tehsildar's process for realizing it, to the judge and magistrate of the city or Zillah in whose jurisdiction the lands on account of which the arrears shall be due, may be situated ; and upon the peon deputed with the Tehsildar's or the Collector's) *Dustuck,* or any other creditable person or persons, attending in court, and making oath to the truth of the circumstance stated in the representation of the collector, either as to the constructing of a koorh by such Brahmin or Brahmins, or as to his or their being prepared to wound or slay the women and children, or any of them, (according as one or both of these expedients, shall be stated to have been resorted to by the Brahmin or Brahmins in question) the magistrate is thereon to issue to such Brahmins a written notice under his official seal in the Persian language and character, and in the Hindoostanee language and Nagree character, which is to be served on him or them by such of the relations, friends or connections, of the said Brahmin or Brahmins as the magistrate may think fit, and have an opportunity of employing for the purpose ; and in default of such relations, friends, or connections, of the said Brahmin or Brahmins, the Magistrate is to cause the notice to be served by a single peon of the same religion, and the tenor of it shall require the said Brahmin or Brahmins to remove the koorh, and the women and people that may be placed in it, or to desist from any preparation for wounding OT killing the women or children, (according as either or both of these offences may be charged in the information) as likewise, either to discharge the balance of rent or revenue that shall have been demanded from him or them or to appear, and entering security for such part of it as he or they may have pleas against the payment of, to file his or their objections to the payment of such part in the city or Zillah Court, that the merits of the case may be enquired into and decided, according to the principles by which other disputed demands and accounts of revenue are under Regulation VI, 1795, directed to be determined ; and the said notice is also to contain a positive and encouraging assurance to the Brahmin or Brahmins in question, that on his or their employing with the exigence of it, by removing the koorh and the persons therein, or by desisting from any preparation to wound or slay the women and children, and either discharging the balance of revenue in demand, or repairing in person, or deputing a Vakeel, to the city or Zillah Court, and entering security for the amount of it, proper enquiry shall be made into the pleas that he or they may have to state against the justice of the demand. If the

issuing of the notice shall fail to induce the said Brahmin and Brahmins to comply with the requisitions of it, a written return to that effect is to be made and attested by the party or parties entrusted with the serving of it, and the magistrate is immediately to issue a warrant under his official seal and signature for the apprehension of such Brahmin or Brahmins in which shall be specified the misdemeanor, contumacy, and arrear, with which he or they stand charged ; and the warrant shall be executed by peons of the Mahomedan religion, as directed in Section 2 ; and if the Brahmin or Brahmins shall refuse to obey or resist, or cause to be resisted, the peons deputed to serve it, or escape, after being taken by them into custody or abscond, or shut himself or themselves up in any house or building, or retire to any place, so that the warrant cannot be served on him or them ; the magistrate, on information to this effect, shall issue a precept to the collector, to cause the nearest Tehsildar to attach the lands that such Brahmin or Brahmins may possess in property, or in mortgage, or in the farm, or *Lakheraje ;* and the lands shall accordingly remain attached, and the profits of them be appropriated by Government, until the liquidation of the balance shall be' effected, either from the produce, or in consequence of the said Brahmin or Brahmins making good the same from his or their other means ; and also, until the said Brahmin or Brahmins shall have been brought, or made his or their appearance before the court, when he or they shall be tried for being concerned either as principles or accomplices in setting up the koorh, or for having been prepared to wound or slay his or their women or children, or any or either of them, in the same manner, and with the same reservation as to the mitigation of the sentence, as is specified in Sections 2, 3 and 4.

Brahmins causing the construction of a koorh, and persons firing it, to be tried on a charge of murder for the loss of the life or lives of any person or persons that may be thereby occasioned

VII. If any Brahmin or Brahmins, on account of any discontent or alarm, well or ill founded, either against Government, or its officers, or servants, shall establish a koorh, in which any person or persons shall, at any period from its construction until its removal, be burnt to death, or otherwise lose their lives, in consequence of such koorh's being set fire to, by any person whomsoever ; the Brahmin or Brahmins who shall have caused the construction thereof, shall be held chargeable with, and made amenable for, the crime of murder; as well as the party or parties who may have been immediately employed, or aided in setting fire to the pile or combustibles in question ; and upon proof of the fact to the satisfaction of the court of circuit, such Brahmin or Brahmins, and such person or persons, setting fire to the koorh, shall be sentenced on trial before the said court, to suffer the punishment of death, in the same manner as if they had committed and been convicted of *Kutl* and, or premeditated murder, according to the doctrines of the Mahomedan law ; and with a view to render the example as public as possible such sentence (whether consistent with the

future of the Mahomedan law officers, or otherwise) is in this case, to be accordingly formally passed by the court of circuit on the Brahmin or Brahmins thus convicted ; but it is to be at the same time explained to the party or parties thus condemned, as it is also hereby expressly provided, that all such trials, and the sentences passed, are by the court of circuit to be submitted (in like manner as is prescribed in Section 47, Regulation IX, 1793,) to the Nizamut Adawlut, and the party or parties condemned under this section, are to remain in Jail to await the final judgment of that court; and if the Nizamut Adawlut shall approve of the condemnation, it shall order the Brahmin or Brahmins in question to be conveyed to Calcutta, to be thence transported for life, in conformity to Section 23, Regulation XVI, 1795, which establishes this commutation for the legal punishment of murder perpetrated by Brahmins within the province of Benares, or, if the court of Nizariut Adawlut shall see cause for not proceeding pursuant to the sentence passed by the court of circuit either in respect of the Brahmin or Brahmins, who may have caused the construction of the *koorh,* or to the party or parties who may have been employed or aided in firing it, they shall submit the case or cases to the Governor General in Council, and either recommend a pardon, or such other commutation by way of mitigation of the punishment, as to the said court may seem proper.

Punishment for Brahmins wounding women and children

VIII. If any Brahmin or Brahmins, under the circumstances, and in the manner, described in the preamble to, and the following sections of this regulation, or under such circumstances, and in such manner, as shall be substantially similar thereto, with a sword, or other offensive weapon, or otherwise, shall actually wound his or their women or children or other women or children, or any or either of them, on account of, in resentment of any real or supposed injury committed towards him or them, by aumils, tehsildars, or other officers, or servants, employed in the revenue or judicial departments ; or shall so wound any of his or their own women or children, or any other woman or child, on account or in resentment of, his or their differences with any individual; he or they shall for such act or acts, be sentenced by the court of circuit to transportation, subject to the same reference to the Nizamut Adawlut and to the like commutation of the punishment, or pardon, as in the cases referred to in section 7.

Punishment for Brahmins killing women or children

IX. If any Brahmin or Brahmins, under the circumstance and in the manner, described in the preamble to, and subsequent sections of this regulation, or under such circumstances, and in such manner, as shall be substantially similar thereto, with a sword or other offensive weapon, or otherwise, shall actually put to death his or their women or children, or other women or children, or any or either of them, on account or in resentment of any real or supposed injury, committed towards him or them by aumils, tehsildars, or any other officers, or servants, employed in the

revenue or judicial departments ; or shall so put to death any of his or their own women or children, or any other woman or child, on account or in resentment of his or their differences with any individual; he or they shall be tried for such homicide and on proof of the fact or facts, be accordingly sentenced by the court of circuit to capital punishment, subject to the same reference to the Nizamut Adawlut and to the like commutation of the punishment, or pardon, as in the cases referred to in section 7; and the families of any Brahmin or Brahmins found guilty of murder under this section, shall, according to the order of the Governor General in Council under date the 17th of June 1789, and the publication made in conformity to it by the Resident at Benares under date the 7th day of July of the same year, be banished from the province of Benares, and the Company's territories; and his and their estates in land shall be forfeited and disposed of as to Government shall seem proper ;. and accordingly, the court of circuit is required to subjoin this order to all sentences that they may pass, on Brahmins for murder under this section, at the same time reporting such sentence and order to the Nizamut Adawlut, together with as accurate an account as they may be able to procure, of the number, sex, and age, of the persons composing the family of such Brahmin or Brahmins and annexing their opinion how far it may be advisable or otherwise, rigourously to enforce the banishment of the family of such Brahmin or Brahmins, or to confirm, or mitigate or annul, the order for the forfeiture of their real property; and the Nizamut Adawlut, on consideration of this sentence and order and of the opinion of the court of circuit, shall either wholly confirm, or recommend to the Governor General in Council such mitigation of the said sentence and order, as shall appear to them proper ; and in all cases there the forfeiture of the landed property of such Brahmin or Brahmins, and that of his or their family, shall be confirmed by the Nizamut Adawlut, the said Court is to advise the Governor General in Council thereof, nor shall such sentence be carried into execution as far as regards the forfeiture of the landed property, without an order from the Governor General in Council approving such part of the sentence, and directing in what manner the lands thus forfeited shall be disposed of.

Limitation as to the forfeiture of the family lands of the offenders

X. In the exercise of the discretion vested in the Nizamut Adawlut by section 9, of recommending to the Governor General in Council, the mitigation of sentences and orders passed by the Court of Circuit, under the said Section, it shall be a rule that whenever the Governor General in Council shall in consequence deem it proper to limit the banishment either to the party or parties committing the murder, or to a certain number only of his or their family or families ; no confiscation or forfeiture of the landed-property shall in such instances take place, but the same shall be entirely left in the possession, and as the property, of those members of the family who shall be exempted from banishment.

Regulations respecting Brahmins sitting *dhurna*

XI. *First.*— In conformity to the order of the Governor General in Council, of the 2nd of November 1792, and the publication issued in consequence at Benares on the 22nd of December of the same year and the further order of the Governor General in Council under date the 7th November 1794, the following rules are enacted for the preventing of *dhurna* ; and for the trial and punishment of Brahmins committing this offence.

Magistrate to cause Brahmins sitting dhurna to be apprehended

Second.—On a complaint in writing being presented to the Magistrate against any Brahmin or Brahmins for sitting *dhurna,* the Magistrate, upon oath being made to the truth of the information, shall issue a warrant under his seal and signature for the apprehension of the person or persons thus complained against, on the prisoner or prisoners being brought before the migistrate, he shall enquire into the circumstances of the charge, and examine the prisoner or prisoners and complainant, and also such other persons (whose depositions are to be taken on oath) as are stated to have any knowledge of the misdemeanor alleged against him or them, and commit their respective depositions to writing ; and after this enquiry, if it shall appear to the magistrate that the misdemeanor charged against the prisoner or prisoners was never committed, or, that there is no ground to suspect him or them to have been concerned in the committing of it, the magistrate shall cause such Brahmin or Brahmins to be forthwith discharged, recording his reasons for the information of the Court of Circuit, in the manner specified in Section 17, Regulation IX, 1793. On the contrary, if it shall appear to the magistrate that the crime or misdemeanor was actually committed, and that there are grounds for suspecting the prisoner or prisoners to have been concerned therein as principals or accomplices, the magistrate shall cause him or them to be committed to prison or held to bail, (according as in his discretion he shall judge proper) to take his or their trial at the next session of the Court of Circuit, and shall bind over the complainant to appear and carry on the prosecution, and the witnesses to attend and give their evidence, in the manner required by Section 5, Regulation IX, 1793. The Trial shall lake place before the court of circuit, in the manner prescribed in the said regulation, and in Regulation XVI, 1795 ;. and after the evidence is closed, it shall be referred to the pundit of the court, to deliver in writing the *vyuvustha,* or exposition of the shaster, as to whether the facts contained in the evidence of amount to proof of the prisoner or prisoners having committed *dhurna,* and in the event of such *vyuvustha* being in the affirmative, the Court of Circuit is to sentence the prisoner or prisoners to be expelled from the province of Benares, and to forfeit all title to the right or claim for the realizing of which the misdemeanor shall have been committed; but this sentence is not to be carried into execution until it shall have been reported by the

Court of Circuit to the Nizamut Adawlut, and it shall have been either wholly confirmed, or directed to be enforced under such mitigation as to the expulsion from the province, or to the forfeiture of the right or claim of the prisoner or prisoners to the property for which he or they sat *dhurna,* as to the said court shall seem proper.

Court of Circuit how to proceed in case all the legal requisites to constitute *dhurna* shaft not be found, although the offence was substantially committed

XII. In the event of the *vyuvustha* which the *pundit* is required to deliver in Section II, not stating me circumstances sworn to in the evidence to amount to the offence of *dhurna,* and the Court of Circuit shall nevertheless be of opinion, from the evidence before them that the prisoner did in fact commit *dhurna,* according to the common construction and 'received meaning of the term, although the act may not have been attended with all the circumstances that may be legally required to constitute *dhurna,* according to the description of it in the books of the Hindoos ; the said court is, under such circumstances, (as directed by the order of the Governor General in Council, under date the 7th of November 1794) to take from the prisoner or prisoners, a *moochulka* or engagement, conditioning that if such prisoner or prisoners shall again sit *dhurna* on any one, or perform any act of a nature similar to *dhurna* as shall, on their being prosecuted before the Court of Circuit, be deemed by the judges of the said court present at the trial, or the majority of them, equivalent or tantamount to *dhurna,* the said prisoner or prisoners shall respectively for such second offence, suffer the full penalty of *dhurna,* as provided for by the order of the Governor General in Council, by being expelled from the province, and by being made to forfeit all right and tide to the claim in question.

How Rajkoomars are to be tried for leaving or causing their female infants to perish for want of nourishment

XIII. In the month of December 1789, the tribe of Rajkoomars having bound themselves to discontinue the practice of causing their female infants to be starved to death ; it is now accordingly ordained, that from the establishment and opening of the city and Zillah courts and of the Court of Circuit in Benares, if any Rajkoomar shall designedly prove the cause of the death of his female child, by prohibiting its receiving nourishment, as set forth in the preamble to this regulation, or in any other manner, the magistrate, on receiving information thereof upon oath, or such other information or proof as he shall deem sufficient to render the charge highly probable, shall cause such Rajkoomar to be apprehended in the manner prescribed, and make die enquiry ordered, in Section 5, Regulation IX, 1793 ; when if it shall appear to the magistrate that the crime has been actually committed, and that there are grounds for suspecting the prisoner to have been concerned in the perpetration of it, the magistrate shall cause

him to be committed to prison to be tried before the Court of Circuit, and shall at the same time take all the other precautions required in the section and regulation last quoted, relative to securing the attendance of the original complainant or informant, and of the witnesses ; and the prisoner shall be tried accordingly, in the manner directed in Regulation IX, 1793, and Regulation XVI, 1795, with respect to other cases of murder.

The second piece of social Legislation which the British undertook is contained in Bengal Regulation VI of 1802. It is a regulation for preventing the Sacrifice of Children at Saugor and other places. It enacted as follows :—

REGULATION VI

A. D. 1802

A Regulation for preventing the Sacrifice of Children at Saugor and other Places. Passed by the Governor General in Council, on the 20th August 1802.

I. It has been represented to the Governor General in Council, that a criminal and inhuman practice of sacrificing children, by exposing them to be drowned, or to be devoured by sharks, prevails at the island of Saugor, and at Bansbaryah, Chaughadh, and other places on the Ganges. At Saugor especially, such sacrifices have been made at fixed periods, namely, the day of full moon in November and in January, at which time also grown persons have devoted themselves to a similar death. Children thrown into the sea at Saugor have not been generally rescued, as is stated to be the custom at other places; but the sacrifice has, on the contrary, been completely effected, with circumstances of peculiar atrocity in some instances. This practice, which is represented to arise from superstitious vows is not sanctioned by the Hindoo law, nor countenanced by the religious orders or by the people at large ; nor was it at any time authorized by the Hindoo or Mahomedan Governments of India. The persons concerned in the perpetration of such crimes are therefore clearly liable to punishment, and the plea of custom would be inadmissible in excuse of the offence. But, for the more effectual prevention of so inhuman a practice, the Governor General in Council has enacted the following Regulation to be in force from the promulgation of it in the provinces of Bengal, Orissa, and Benares.

II. If any person or persons shall wilfully, and with the intention of taking away life, throw or cause to be thrown, into the sea or into the river Ganges, or into any other river or water, any infant or person not arrived at the age of maturity, with or without his or her consent, in consequence whereof such person, so thrown into water, shall be drowned, or shall be destroyed by sharks or by alligators, or shall otherwise perish, the person

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or persons so offending shall be held guilty of wilful murder, and on conviction shall be liable to the punishment of death ; and all persons aiding or abetting the commission of such act shall be deemed accomplices i n the murder, and shall be subject to punishment accordingly. The trials of prisoners convicted as principals or accomplices of the crimes specified in this section shall be referred to the Court of Nizamut Adawlut, which is to pass sentence thereupon according to Section LXX, Regulation IX, 1793 whatever may be the futwah of the law officers of that Court. (or report to the Governor General in Council the case of any prisoner who may appear to that court to be a proper object of mercy, in conformity with Section LXXIX, Regulation IX, 1793).

III. If a child or any person not arrived at maturity, be thrown into water, as stated in the preceding section, and be rescued from destruction, or by any means escape from it, the persons who shall have been active in exposing him or her to danger of life, and all aiders and abettors of such act, shall be held guilty of a high misdemeanor, and on convicting shall be liable to such punishment as the Courts of Circuit, under the *futwah* of their law officers, may judge adequate to the nature and circumstances of the case.

IV. The magistrates of districts wherein the sacrificing of children may have been hitherto practised are required to be vigilant to prevent the continuance of the practice, and shall cause the provisions of this Regulation to be from time to time proclaimed at the places, and in the season, where and when such sacrifices have hitherto been effected.

The Second piece of Social Legislation is one dealing with Suttee. It is Bengal Regulation XVII of 1829; It enacted as follows:—

REGULATION XVII

A.D. 1829

A Regulation for declaring the practice of Suttee, or of Burning or Burying alive the Widows of Hindoos, illegal, and punishable by the Criminal Courts. Passed by the Governor General in Council, on the 4th December 1829.

Preamble

I. The practice of suttee, or of burning or burying alive the widows of Hindoos, is revolting to the feelings of human nature; it is nowhere enjoined by the religion of the Hindoos as an imperative duty ; on the contrary, a life of purity and retirement on the part of the widow is more especially and preferable inculcated, and by a vast majority of that people throughout India the practice is not kept up nor observed; in some

extensive districts it does not exist; in those in which it has been most frequent, it is notorious that, in many instances, acts of atrocity have been perpetrated, which have been shocking to the Hindoos themselves, and in their eyes unlawful and wicked. The measures hitherto adopted to discourage and prevent such acts have failed of success and the Governor General in Council is deeply impressed with the conviction that the abuses in question cannot be effectually put an end to without abolishing the practice altogether. Actuated by these considerations, the Governor General in Council, without intending to depart from one of the first and most important principles of the system of British Government in India, that all classes of the people be secure in the observance of their religious usages, so long as that system can be adhered to without violation of the paramount dictates of justice and humanity, has deemed it right to establish the following rules, which are hereby enacted to be in force from the time of their promulgation throughout the territories immediately subject to the presidency of Fort William.

II. The practice of suttee, or burning or burying alive the widows of Hindoos, is hereby declared illegal, and punishable by the Criminal Courts.

III. *First.*—All zamindars, talookdars, or other proprietors of land, whether malguzarry or lakhiraj; all sudder farmers and under-renters of land of every description ; all dependent talookdars, all naibs and other local agents ; all native officers employed in the collection of the revenue and rents of lands on the part of Government, or the Court of Wards; and all munduls or other head men of villages, are hereby declared especially accountable for the immediate communication to the officers of the nearest police station of any intended sacrifice of the nature described in the foregoing section ; and any zemindar, or other description of persons above noticed, to whom such responsibility is declared to attach, who may be convicted, of wilfully neglecting or delaying to furnish the information above required, shall be liable to be fined by the magistrate or joint magistrate in any sum not exceeding two hundred rupees, and in default of payment, to be confined for any period of imprisonment not exceeding six months.

Police Darogas, how to act on receiving the intelligence of the intended sacrifice

Second.—Immediately on receiving intelligence that the sacrifice declared illegal by this Regulation is likely to occur, the police darogah shall either repair in person to the spot, or depute his mohurrir or jamadar, accompanied by one or more burkundauzes of the Hindoo religion, and it shall be the duty of the police officers to announce to the persons assembled for the performance of the ceremony, that it is illegal, and to endeavour to prevail on them to disperse, explaining to them that, in the

event of their persisting in it, they will involve themselves in a crime, and become subject to punishment by the Criminal Courts. Should the parties assembled proceed in defiance of these remonstrances to carry the ceremony, into effect, it shall be the duty of the police officers to use all lawful means in their power to prevent the sacrifice from taking place, and to apprehend the principal person aiding and abetting in the performance of it; and in the event of the police officers being unable to apprehend them, they shall endeavour to ascertain their names and places of abode, and shall immediately communicate the whole of the particulars to the magistrate or joint magistrate for his orders.

How to act when the intelligence of sacrifice may not reach them until after it shall have actually taken place

Third.—Should intelligence of a sacrifice declared illegal by this Regulation, not reach the police officers until after it shall have actually taken place, or should the sacrifice have been carried into effect before their arrival at the spot, they will nevertheless institute a full inquiry into the circumstances of the case, in like manner as on all other occasions of unnatural death, and report them for the information and orders of the magistrate or joint magistrate to whom they may be subordinate.

IV. *First.*—On the receipt of the reports required to be made by the police darogahs, under the provisions of the foregoing section, the magistrate or joint magistrate of the jurisdiction in which the sacrifice may have taken place shall inquire into the circumstances of the case, and shall adopt the necessary measures for bringing the parties concerned in promoting it to trial before the Court of Circuit.

Persons convicted of aiding and abetting in the sacrifice of a Hindoo widow, shall be deemed guilty of culpable homicide, and liable to punishment

Second.—It is hereby declared, that after the promulgation of this Regulation, all persons convicted of aiding and abetting in the sacrifice of a Hindoo widow, by burning or burying her alive, whether the sacrifice be voluntary on her part or not shall be deemed guilty of culpable homicide, and shall be liable to punishment by fine or by imprisonment, or by both fine and imprisonment, at the discretion of the Court of Circuit, according to the nature and circumstances of the case and the degree of guilt established against the offender, nor shall it be held to be any plea of justification, that he or she was desired by the party sacrificed to assist in putting her to death.

Third.—Persons committed to take their trial before the Court of Circuit for the offence above mentioned, shall be admitted to bail or not, at the discretion of the magistrate or joint magistrate, subject to the general rules in force in regard to the admission of bail.

The Court of Nizamut Adawlut not precluded from passing sentence of death in certain cases

V. It is further deemed necessary to declare, that nothing contained in this Regulation shall be construed to preclude the Court of Nizamut Adawlut from passing sentence of death on persons convicted of using violence or compulsion, or of having assisted in burning or burying alive a Hindoo widow, while labouring under state of intoxication, or stupefaction, or other cause impeding the exercise of her free will, when, from the aggravated nature of the offence proved against the prisoner die court may see circumstances to render him or her a proper object of mercy.

The third piece of Social Legislation is the Caste Disabilities Removal Act XXI of 1850. It enacts as follows :—

THE CASTE DISABILITIES REMOVAL ACT (XXI OF 1850)

An act for extending the principle of section 9, Regulation VII, 1832, of the Bengal Code throughout the Territories subject to the Government of the East India Company.

Preamble

WHEREAS, it is enacted by section 9, Regulation VII, 1832, of the Bengal Code that "whenever in any civil suit the parties to such suit may be of different persuations, when one party shall be of the Hindu and the other of the Muhammadan persuation, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuations, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled, and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company it is enacted as follows :—

Law or Usage which inflicts forfeiture of, or affects, rights of change of religion or loss of caste to cease to be enforced

1. So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any

person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories."

The fourth piece of Social Legislation is the Hindu Widows' Remarriage Act XV of 1856. It enacts as follows:—

An Act to remove all legal obstacles to the marriage of Hindu Widows.

Preamble

WHEREAS, it is known that, by the law as administered in the Civil Courts reestablished in the territories in the possession and under the Government of the East Indian Company, Hindu widows with certain exceptions are held to be by reason of their having been once married, incapable of contracting a second valid marriage, and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting property ; and

WHEREAS, many Hindus believe that this imputed legal incapacity, although it is in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administered by the Courts of Justice shall no longer prevent those Hindus who may be so minded from adopting a different custom, in accordance with the dictates of their own conscience ; and

WHEREAS, it is just to relieve all such Hindus from this legal incapacity of which they complain, and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare; it is enacted as follows:—

Marriage of Hindu widows legalized

1. No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding.

Rigsts of widow in deceased husband's property to cease on her re-marriage

2. All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.

The fifth piece of Social Legislation prescribed an age limit for sexual intercourse with a woman. It is Act XLV of 1860 (Penal Code) Sec. 375. It enacted as follows:—

"A man is said to commit 'rape' who except, in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following :—

First: Against her will.

Secondly : Without her consent

Thirdly : With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fourthly : (Left blank—ed.)

Fifthly: With or without her consent, when she is under ten years of age.

Explanation : (Left blank—ed.)

Exception : Sexual intercourse by a man with his own wife not being under ten years of age, is not rape."

WHAT ABOUT THE UNTOUCHABLES ?

Caste and Untouchability are the two great social evils in India. Caste has disabled the whole Hindu Society. Untouchability has suppressed a large class of people. And yet the British Government has completely ignored the two evils. One may search in vain the Indian Code to find any law dealing with Caste or with Untouchability. It is true that caste and untouchability are social matters. They will vanish when people will begin to interdine and intermarry. Law cannot compel a person to dine with another. It is true, law cannot compel a person to marry with another. But it is also true that Law can prohibit a Caste

from preventing a person from marrying a person outside his caste. Caste continues because a Caste can conspire to punish its members if they break the rules of caste by declaring a social boycott against him. It would have been perfectly possible to have enacted a law declaring such social boycott to be a crime. Again in the matter of Untouchability the disabilities are not merely social. They are fundamentally civic. Inability to get admission to school, to be able to take water from a public well, to be able to get into a public conveyance, to be able to get into public service, are all civic disabilities. It was the duty of the British Government to legislate at least to the extent necessary to protect their civic rights. It was possible to do so. A short Enactment on the lines of Caste Disabilities Removal Act would have been sufficient. Yet the British Government has gone on as though these two evils did not exist at all. Indeed it is most extraordinary thing to note that although Legislative Bodies were established in India in 1861 and have been passing laws on every social questions and discussing public questions, yet except on two occasions the Untouchables were not even mentioned. The first occasion on which they were mentioned was in 1916, when one Parsi gentleman Sir Maneckji Dadabhoy moved the following Resolution in the Central Legislature :—

> "That this Council recommends to the Governor General in Council that measures be devised with the help, if necessary, of a small representative committee of officials and non-officials for an amelioration in the moral, material and educational condition of what are known as the Depressed Classes, and that, as a preliminary step die Local Government and Administrations be invited to formulate schemes with due regard to local conditions."

There was no sympathy to this resolution. The Hindu members of the Legislature were angry with the mover for his having brought such a subject before the Legislature.

Pandit Madan Mohan Malviya said:—

> "Sir, it seems rather ungracious to say so, but a sense of the dignity of the proceedings of this Council compels me to utter a protest against the manner in which sometimes subjects are brought before it for consideration .....
>
> "In moving the Resolution the object of which I may at once say, has my whole-hearted support, my friend, the Hon'ble Mr. Dadabhoy, went out of his way to make remarks against the Hindu community which,

I think, the ought to have avoided .....I am not here to defend everything Hindu that exists. I am not here to appologize for the many prejudices or superstitions, which I am sadly conscious are to be found among one portion or another of our community. But it is not the Hindu community alone which finds it difficult to get rid of prejudices ..... Without meaning the smallest disrespect, I would instance the case of the marriage with a Deceased Wife's Sister Bill ..... We Hindus have got some much worse prejudices to fight against ..... But I do not think it is within the province of a member of this Council either to lecture to the Hindus present here or to those outside as to the socio-religious disabilities among themselves which they might fight against and remove. I think the province of Members of this Council is limited to dealing with matters of legislation or other administrative matters which may properly be taken up by the Government. As has been already pointed out, the Government have, in pursuance of a wise and liberal policy, laid it down that they shall not interfere in matters of a religious or socio-religious character, and accusations of the character in question ought, therefore, to be avoided there ..... I do not wish to descend into a disputation as to the merits of the imputations or the justification for the general observations that have been made ..... And yet, if I do not, I am left in the position that I have heard without protest remarks showing that the Hindu Community from one end of the country to the other was guilty of all that my friend, the Hon'ble Mover of the Resolution, has suggested ..... I am conscious that we Hindus have many prejudices to fight against and conquer; but I submit that this is not the place to tell us of them."

Even a social Reformer like Sir Surendranath Bannerjee was not happy. He said :—

".....I regret very much that my Hon'ble friend the Mover of this Resolution went somewhat out of his way to level (I do not think he did it intentionally) an attack against the Hindu Community. He must bear in mind that we are the inheritors of past traditions, of a civilization as ancient as the world. That civilization undoubtedly had its defects, but that civilization in the morning of the world was the guarantee for law and order and social stability. In the past it afforded consolation to millions. We are trying to evolve a national system in conformity with our present environments, but we cannot push aside all those things which have come down to us from the past. We reverence the venerable fabric which has been built up by our ancestors. We notice their defects, and we are anxious to get rid of them gradually and steadily, not by any revolutionary movement, but the slow, steady process of evolution. My friend must have a little sympathy with us ; he must extend to us the hand of generosity in our efforts to deal with the problems. My Hon'ble friend suggests that Government should take measures..... We welcome

the action of Government in a matter of this kind, but after all, if you analyse the situation, it is a social problem, and the British Government, very properly, as I think, in conformity with its ancient traditions, holds aloof from all interference with social questions.

"Government can do a great by way of education, a great deal by helping forward the industrial movement among the Depresseed Classes. But the vital problem, the problem of problems, is one of social uplifting, and there the Government can only afford to be a benevolent spectator. It may sympathize with our efforts, but it cannot actively participate in them ....."

The Hon'ble Mr. Dadabhoy had to defend himself. In his reply he said:—

"Sir, I find myself in a very peculiar and unfortunate position. There are two parties in this Council, and they are both on the defensive on this occasion. My justification for bringing in this Resolution, if any justification were needed, is to be found in the unenthusiastic and half hearted support which I have received from my non-official colleagues. It was no pleasure, I assure you, Sir, to me to bring in this Resolution. If I could possibly have avoided it, I would have very cheerfully and very willingly done so. This is the sixth year of the life of this Reformed Council, as Hon'ble Members are aware, and the second term is now approaching expiration. During the major portion of that time—the five years that I have been on this Council—I anticipated that the champions of public liberty, public spirit and public enterprize and culture—men like my friends the Hon'ble Surendra Nath Bannerjee or the Honourable Pandit Madan Mohan Malaviya—would take the trouble of moving a Resolution to this effect. I waited all this time to see if one of these enthusiastic members would bring in a Resolution for the amelioration of the Depressed Classes, but when I found that none of them had taken up the matter—though at times this matter is discussed even in the Congress Pandal in a certain manner; when I found that it was not taken up in this Council— ..... I, as a Parsee, representing a Hindu constituency thought it my duty to bring this matter for public discussion in this Council."

The Government naturally felt relieved by this quarrel. Resting behind the moral support of the Hindu members of the Legislature for covering up their delinquency Sir Reginald Crad-dock speaking on behalf of the Government disposed off the Resolution in the following terms :—

"Sir, we sympathize with the objects of the Hon'ble Mr. Dadabhoy's Resolution. We are willing to go so far as to ask Local Governments to put on record what they have done, are doing, and what further they can do,

to improve the condition of these people. But we can place no faith in special committees. Have I not indicated to the Council how wide are the problems, and how impossible it would be to deal with them by means of Committees ? The problems extend over me whole range of Government from top to bottom. What I say is that, while extending our sympathy to the objects aimed at by the Hon'ble Mr. Dadabhoy, we can go no further than promise to refer the question to Local Governments, and ask them whether they can do more than they are doing. That is as far as we can go, and with that assurance, I will ask the Hon'ble Member to withdraw his Resolution."

The second time the Untouchables are mentioned in the proceedings of the Legislature was in 1928 when Mr. M. R. Jayakar moved the following Resolution :—

"This Assembly recommemds to the Governor-General in Council to issue directions to all Local Governments to provide special facilities for the education of the Untouchables and other depressed classes, and also for opening all public services to them, specially the Police."

On this occasion the Government of India was no more enthusiastic than it was in 1916. Mr. G. S. Bajpai, speaking on behalf of the Government of India said :—

"The Local Governments are alive to their responsibility, they are doing what they can. It is not my privilege to claim for them that they have achieved the ideal, but I do claim that there is an awakening and an awakened and roused sense of responsibility and a roused sense of endeavour for improving the position of these depressed classes. That being so, it is no function to interfere by direction or by demand. They (i.e. the Government) can, if the House wishes, communicate to them the views of the House on this very national problem."

For this speech, Mr. Bajpai, according to the official report of the proceedings, was cheered ! !

Such is the record of the British Government in the matter of social Reform. What a miserable record it is ? How meagre a record it is; Six social Laws in sixty years of legislative activity ! ! From the very beginning, its attitude to social reform has been of a very halting character. It kept on some mask of a responsible Government up to 1860. After 1860 it threw off the mask. The Government would not move and reform came to a dead stop. In 1881 a great agitation was started in favour of legislation prohibiting child marriage. Rather than be pestered

with social reform, it took courage to announce publicly and once for all its policy of opposition to reform. In a Government Resolution of that year, the British Government proclaimed :

> "In dealing with such subjects as those raised in Mr. Malabari's Notes, the British Government in India has usually been guided by certain general principles. For instance, when caste or custom enjoins a practice which involves a breach of the ordinary criminal law, the State will enforce the law. When caste or custom lays down a rule which is of its nature enforceable in the Civil Courts, but is clearly opposed to morality or public policy, the State will decline to enforce it. When caste or custom lays down a rule which deals with such matters as are usually left to the option of citizens, and which does not need the aid of Civil or Criminal Courts for its enforcement, State interference is not considered either desirable or expedient.
>
> "In the application of such general principles to particular cases, there is doubtless room for differences of opinion; but there is one common-sense test which may often be applied with advantage in considering whether the State should or should not interfere in its legislative or executive capacity with social or religious questions of the kind now under notice. The test is, 'Can the State give effect to its commands by the ordinary machinery at its disposal ?' If not, it is desirable that the State should abstain from making a rule which it cannot enforce without a departure from its usual practice or procedure.
>
> "If this test be applied in the present case, the reasons will be apparent why His Excellency in Council considers that interference by the State is undesirable, and mat the reforms advocated by Mr. Malabari, which affect the social customs of many races with probably as many points of difference as of agreement, must be left to the improving influence of time and to the gradual operation of the mental and moral development of the people by the spread of education.
>
> "It is true that the British Government in India has by its legislation set up a standard of morality independent of, and in some material respects differing from, the standard set up by caste; and it may be that the former standard has had some beneficial effect in influencing native customs, practices, and modes of thought. But legislation, though it may be didactic purposes; and in the competition of influence between legislation on the one hand, and caste or custom on the other, the condition of success on the part of the former is that the Legislature should keep within its natural boundaries, and should not, by overstepping those boundaries, place itself in direct antagonism to social opinion."

The policy laid down in this Resolution has ever since remained the policy of the British Government in the matter of Social Reform.

V

Why did the British Government leave the Untouchables in the cold without any care or attention ?

The explanation for so criminal a neglect was furnished by Sir Reginald Craddock. In replying on behalf of the Government of India on the Resolution moved by Sir Maneckji Dadabhoy in the Imperial Legislative Council in 1916, he stated what the position of the British Government took with regard to the Untouchables in the following terms :—

> "With regard to them (i. e. the Untouchables) the difficulty is not that Government does not recognize them, but that, until the habits and prejudices of centuries are removed, the hands of their neighbours must necessarily press upon them ..... you must remember that these people live mostly in villages and very often in the back lane of towns, and that their neighbours have not yet come under these broad and liberal minded influences. Therefore, as many speakers have indicated, the problem in dealing with this question is more social and religious than purely administrative.
>
> "I know myself of many difficulties in the matter of schools. There are many places where the Mahar boys will not be allowed into the school; they may be allowed in the Verandah and get only a small part of the master's attention there, or they may be entirely excluded. But it is only gradually that the difficulty can be met. I have constantly dealt with this very problem on the spot. I have reasoned with people ; I have said to them. There are tax payers like yourselves, either let them come into the school, or if you wish to indulge in your own prejudices—they may be reasonable prejudices, as you consider them—but if you wish to indulge them, should you not contribute something in order that these boys may have a school of their own ? In that what some of the better people have come forward to help in the matter of wells, and schools for the low castes ; they have assisted, and the difficulties have been got over. But of course it is a matter which must take time, and Government itself cannot use compulsion. They go rather near to it sometimes, for example, in travelling by railway : and when petitions are presented in Court. But they cannot ensure that these people shall always be well-treated in their offices. Very often, I think, some of these classes refrain from seeking service they might otherwise wish to secure, because their neighbours are not likely to treat them warmly. Although the Hon'ble mover described the statement made by the Government of Bombay as a 'magnificent *non-possumus*', I think that it very accurately describes that the real difficulties of the situation are. Even though Government is willing to help in every way these unfortunate people, yet it remains true that' the position

of these castes and tribes in the future depends partly on their own selves, and partly those more favoured Indian Communities, which by extending the hand of human comradeship or hardening their hearts and averting their faces, have it in their power to elevate or to degrade them.'

"That Sir, I think, represents very truly and accurately the position of affairs as regards these Depressed Classes. * * *"

The same attitude was reiterated in 1928 when the resolution of Mr. Jayakar was discussed in the Central Legislative Assembly. Mr. Bajpai speaking on behalf of the Government said:—

" .....it is not by increasing the number of special schools or by providing special facilities that you are going to solve this problem (of the Untouchables) ..... You will solve this problem only by a quickening and broadening the spirit of all sections of the community towards the so called depressed classes."

Leaving the problem to be solved by the quickening of me consciences of the Hindus, the British Government just neglected the Untouchables and believed that as a Government they were not called upon to do anything to help to improve the lot of the Untouchables. How did the British justify this neglect of so helpless and so downtrodden a class of their subjects as the Untouchables ? The answer is very clear. They did it by taking the view that the evil of Untouchability was not of their making. They argued that if they did not deal with the evil of untouchability, they are not to be blamed for it because the system did not originate with them. This was clearly enunciated by the Government of Bombay in 1856. In June 1856 a petition was submitted on behalf of a Mahar boy to the Government of Bombay complaining that though willing to pay the usual Schooling fee, he had been denied admission to the Dharwar Government School. In disposing of the application, the Government of Bombay thought the matter so important that it issued a Resolution dated 21st July 1856 of which the following is the full text:—

"1. The question discussed in the correspondence is one of very great practical difficulty.

2. There can be no doubt that the Mahar petitioner has abstract justice on his side ; and Government trust that the prejudices which at present prevent him from availing himself of existing means of education in Dharwar may be ere long removed.

3. But Government are obliged to keep in mind that to interfere with the prejudices of ages in a summary manner, for the sake of one or few individuals, would probably do a great damage to the cause of education. *The disadvantage under which the petitioner is not one which has originated with the Government,* and it is one which Government cannot summarily remove by interfering in his favour, as he begs them to do."

This is of course an easy view of the duties of a Government. It is not a responsible view. It is certainly not a view which a civilized Government would take. A Government which is afraid to govern is not a Government. It is only a corporation formed to collect taxes. The British Government undoubtedly meant to be more than a mere tax gathering machinery. It claimed to be a civilized Government. Then why did it not act to prevent wrong and injustice ? Was it because it had no power or was it because it was afraid to use them or was it because it felt that there was nothing wrong in the social and religious system of India ?

The answer is that it had the power, the amplest power. It did not use it because for a part of the period it did not think that there was anything wrong in the social system of the Hindus and during the period when it became convinced that things were wrong it was overpowered by sense of fear.

It is notorious that the beginning of its career the British had a dread and a horror of the consequences of permitting the diffusion of "Christian truth". But it is not quite as notorious that the British at the same time were showing a corresponding respect for native prejudices. Mr. Ward, a Missionary in Calcutta records in his journal for 1802 the following fact:—

> "Last week a deputation from the Government went in procession to Kali Ghat, and made a thank offering to this Goddess of the Hindoos, in the name of the Company, for the success which the English have lately obtained in this country. Five thousand rupees were offered. Several thousand natives witnessed the English presenting their offerings to this idol. We have been much grieved at this act, in which the natives exult over us."[1]

Another illustration of the same is furnished by Mr. Robert Lindsay who was a civilian in the employment of the East India

[1] Quoted in History of Serampore Mission Vol. I, p. 157.

Company in the time of Warren Hastings. Describing his initiation into his new office of Resident at Sylhet he says —

> "I was now told that it was customary for the new Resident to pay his respects to the shrine of the tutelar saint, Shaw Jullol. Pilgrims of the Islam faith flock to this shrine from every part of India, and afterwards found that the fanatics attending the tomb were not a little dangerous. It was not my business to combat religious prejudices, and I therefore went in state, as others had done before me, left my shoes on the threshold, and deposited on the tomb five gold mohurs as an offering. Being thus purified I returned to my dwelling and received the homage of my subjects."

How much the British Government had become associated with and interested in supporting native prejudices can be seen from the following memorial which was submitted to the Government of Madras by Bishop Corrie in 1833. The instances cited in the Memorial were these :—

> "First, that it is now required of Christian servants of the Government, both civil and military, to attend to Heathen and Mahomedan religious festivals, with the view of showing them respect Second, that in some instances they are called upon to present offerings, and to do homage to idols. Third, that the impure and degrading services of the pagodas are now carried on under the supervision and control of the principal European, and therefore. Christian officers of the Government, and the management and regulation of the revenues and endowments, both of these pagodas and mosques, so vested in them, under the provision of regulation vii of 1817, that no important idolatrous ceremony can be performed, no attendant of the various idols, not even the prostitutes of the temple, be entertained or discharged, nor the least expense incurred. without me official concurrence and orders of the Christian functionary. Fourth, that British officers, with the troops of the Government, are also now employed in firing salutes and in otherwise rendering homage to Mahomedan and idolatrous ceremonies, even on the Sabbath day ; and Christians are thus not unfrequently compelled by the authority of Government to desecrate their own most sacred institutions and to take part in unholy and degrading superstitions."

> This is enough to show that the British Government in India "not content with their exertions to suppress the diffusion of the saving truths of the Gospel was openly and authoritatively aiding and abetting the worst forms of devil-worship; that they were taking all the hideous indecencies and revolting cruelties of Hindooism under their especial patronage; sending their own masters-of-the-ceremonies to preside over the hellish orgies ; and with paternal tenderness managing the property of the idol temples pampering the priests, cherishing the dancing girls, and doing

such honour to heathen is generally as was best calculated to maintain it in a high state or exultant obesity."

It was not till 1841 that Government dissociated itself from actual participation in the Hindu and Mahomedan religions ceremonies and that too after a great deal of agitation by the Missionaries.

"In a circular letter signed by the Military Secretary to the Government of Fort St. George, and addressed to the Commander-in-Chief, under date of July 6, 1841, it is intimated, "under instructions from the Court of Directors, conveyed through the Government of India", that "the attendance of troops or of military bands at native festivals or ceremonies, and the firing of salutes on occasions of that nature," were "in future to be discontinued, with the object of separating the Government and its officers, as far as possible, from all connexion with the ceremonies of the Hindoo and Mahomedan religions." The ordinary marks of respect paid to native princes on the occasions of their going forth or returning from such festivals or religious observances were, however, to be paid; and the change was to be effected "in a manner calculated not to alarm the minds of the natives or to offend their feelings. "These orders were circulated by the Commander in-Chief to the Generals commanding divisions, and by them to the regiments under their several commands."

What reform could be expected from a Government which had become so steeped in native prejudices and which wasted such official resources to tend them and keep them up ?

It was stricken and paralyzed by sympathy. When it ceased to sympathise with the prejudices it was overtaken by fear. This fear arose out of two considerations.

The first consideration related to the promises it had made to the people of India. On assuming the Government of any new territory, previously under native rule, it was the practice of the British Government to announce to the people that they would be protected in the free exercise of their religions and that neither their institutions nor their usages would be assailed. Thus in 1801 a solemn declaration was made, in the following terms to the people of the Carnatic :—

"Although the Right Honourable the Governor in Council trusts that the experience which the inhabitants of the Carnatic have already had, will have rendered it unnecessary for His Lordship to explain the general principles of moderation, justice, protection, and security, which form the characteristic features of the British Government, yet His Lordship in

accepting the sacred trust transferred to the Company by the present engagements, invites the people of the Carnatic to a ready and cheerful obedience to the authority of the Company, in a confident assurance of enjoying, under the protection of public and defined laws, every just and ascertained civil right, with a free exercise of the religious institutions and domestic usages of their ancestors".

In may 1834 the following proclamation was issued to the people of Coorg when it was conquered :—

"Whereas it is the unanimous wish of the inhabitants of Coorg to be taken under the protection of the British Government, His Excellency the Right Honourable the Governor-General has been pleased to resolve that the territory heretofore governed by Veer Rajunder Woodyer shall be transferred to the Honourable Company. The inhabitants are hereby assured that they shall not again be subjected to native rule; that their civil rights and religious usages will be respected, and the greatest desire will invariably be shown by the British Government to augment their security, comfort, and happiness."

In 1849, on the annexation of the Punjab, the following assurance was given to the people :—

"The British Government will leave to all the people whether Mussulman, Hindoo, or Sikh, the free exercise of their own religions; but it will not permit any man to interfere with the other in the observance of, such forms and customs as their respective religions may either enjoin or permit."

Other similar proclamations may be cited. They were treated as pledges. Whether it was just and politic that such pledges should have been given, it was felt that it was unpolitic to ignore them once they were given. This was the general view. But there were always some who construed them literally and whose point of view was not to draw any distinction and make any reservations and who wished to interpret the pledges as amounting to saying to the Indians, "You have enjoyed it undisturbedly under the new" and who argued that "any departure from this would be a breach of faith." Fear of breach of faith was one consideration. Fear of open rebellion was another. Fear of rebellion so far as the British Government in India was concerned was not a fear of the unknown. It was a fact of experience, There was one rebellion in 1801 which was known as the Vellore Mutiny. There was another rebellion in 1857. It was known as

the Sepoy Mutiny. The Vellore Mutiny was a small flame. But the Sepoy Mutiny was a conflagration. In both cases the cause alleged was an interference with the religious practices of the Hindus. Two rebellions are enough to teach a lesson and the lesson of these two rebellions was not lost upon the British Government. The Vellore Mutiny of 1801 had made the British Government cautious in the matter of social innovations. The Sepoy Mutiny of 1857 made hostile to any kind of social reform. The British did not want to take any risk and from their point of view the risk was very great The Mutiny made them so panicky that they felt that loss of India was the surest consequence of social reform and as they were anxious to keep India they refused to look at any project of Social Reform.

This attitude of the British Government to Social reform is quite understandable. However sovereign a Government may be its authority as pointed out by Prof. Dicey[1] is circumscribed by two limitations :—

> "There is first of all the internal limitation which arises from the character, motives and interests of those who are in power. If the Sultan does not abolish Mahomedanism, Pope ban Catholicism, the Brahmin condemn caste, or the British Parliament declare the preservation of blue-eyed babies illegal, it is not because they "cannot" do things, but it is because they "will" not do those things. In the same way if the Executive in India did not do certain things most conducive to progress, it was because by reason of its being imperial and also by reason of its character, motives and interests, it could not sympathize with the living forces operating in the Indian Society, was not charged with its wants, its pains, its cravings and its desires, was inimical to its aspirations, did not advance Education, disfavoured Swadeshi or snapped at anything that smacked of nationalism it was because all these things went against its grain. But an irresponsible government is powerless to do even such things as it may like to do. For its authority is limited by the possibility of external resistance. There are things which it would do but dare not do for the fear of provoking thereby resistance to its authority. Ceaser dare not subvert the worship of the Roman people, a modem parliament dare not tax the Colonies, however much they would. For the same reason the Government of India dared not abolish the caste system, prescribe monogamy, alter the laws of succession, legalize intermarriage or venture to tax the tea planters. Progress involves interference with the existing code of social life and interference is likely to cause resistance. None the less a

[1] Law of the Constitution 1915 pp. 74—82.

Government which is of the people and is not detached from them can venture on the path of progress, because it is in a position to know where the obedience will end and resistance will begin. But the Indian Executive, not being of the people, could not feel the pulse of the people. The gist of the matter is that the irresponsible Executive which had been in power in India was paralysed between these two limitations on its authority and much of what to make life good was held up. Part of the programme it would not undertake and the other part it could not undertake. That there was some advancement in material progress is not to be denied But no people in the world can long remain contented with the benefits of peace and order, for they are not dumb brutes. It is foolish to suppose that a people will indefinitely favour a bureaucracy because it has improved their roads, constructed canals on more scientific principles, effected their transportation by rail, carried their letters by penny post, flashed their messages by lightening, improved their currency, regulated their weights and measures, corrected their notion of geography, astronomy and medicine and stopped their internal quarrels Any people, however patient, will sooner or later demand a Government that will be more than a mere engine of efficiency."

People wanted freedom political, economic and social. This the British Government declined to create :—

"As a result of this, so far as the moral and social life of the people was concerned, the change of Government by the Moghuls to a Government by the British was only a change of rulers rather than a change of system. Owing to the adoption of the principle of non-interference partly by preference and partly by necessity by the British 'the natives of India found themselves under a Government distinguished in no vital respect from those under which they had toiled and worshipped, lived and died through all their weary and forgotten history. From a political standpoint, the change was but the replacement of one despotism by another. It accepted the arrangements as it found them[1] and preserved them faithfully in the manner of the Chinese tailor who, when given an old coat as a pattern, produced with pride an exact replica, rents, patches and all.'

This policy of non intervention though understandable, was so far as the Untouchables were concerned, mistaken in its conception and disastrous in its consequences. It may be granted that Untouchables can only be lifted up by the Hindus recognizing his human rights and him as a human being as correct. But that

[1] The poll tax has been continued in Burma simply because it was found to exist there on the day of conquest.

2. Bernard Houghton, *Bureaucratic Government.*

does not dispose of the matter. Question remains how is this recognition of his rights as a human being to be secured. There are only two ways of helping to realize this object One way is to make him worthy of respect and the other is to punish those who disrespect him and to deny him his rights. The first way involves the duty to educate him and to place him in positions of authority. The other way involves social reform by making recognition of Untouchability a penal office. Neither of this the British Government was prepared to do. It would not give the Untouchables any preferential treatment in public service. It would not undertake to reform Hindu Society. The result was that Untouchable has remained what he was before the British, namely an Untouchable. He was a citizen but he was not given the rights of a citizen. He paid taxes out of which schools were maintained but his children could not be admitted in to those schools. He paid taxes out of which wells were built but he had no right to take water from them. He paid taxes out of which roads were built. But he has no right to use them. He paid taxes for the upkeep of the state. But he himself was not entitled to hold offices in the state. He was a subject but not a citizen. The Untouchable stood most in need of education and supply of water. He stood mostly in need of office to protect himself. Owing to his poverty he should have been exempted from all taxes. All this was reversed. The Untouchable was taxed to pay for the education of the touchable. The Untouchable was taxed to pay for the water supply of the touchable. The Untouchable was taxed to pay for the salary of the touchables in office.

What good has British conquest done to the Untouchables ? In education, nothing ; in service, nothing; in service, nothing. There is one thing in which they have gained and that is equality in the eye of the law. There is of course nothing special in it because equality before law is common to all. There is of course nothing tangible in it because those who hold office often prostitute their position and deny to the Untouchables the benefit of this rule. With all this, the principle of equality before law has been of special benefit to the Untouchables for the simple reason that they never had it before the days of the British. The Law of Manu did not recognize the principle of equality. Inequality was the soul of the

Law of Manu. It pervaded all walks of life, all social relationships and all departments of state. It had fouled the air and the Untouchables were simply smothered. The principle of equality before law has served as a great disinfectant. It has cleansed the air and the Untouchable is permitted to breath the air of freedom. This is a real gain to the Untouchables and having regard to the ancient past it is no small gain.

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PART III

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I. *Lectures on the English Constitution.*

II. *Paramountcy and the claim of the Indian States to be Independent.*

In the Government Law College Magazine, following observations are made in the 'College Notes, 8th January 1936 issue:—

> "We however note with satisfaction that Mr. Fyzee has handed over charge to no less a person than Dr. Ambedkar. A lawyer of repute, he is a close student of Economics, an authority on Constitutional Law and a personality known throughout India and elsewhere. To write more about him would be otiose. Expecting much from our Principal we shall not embarrass him now. We prefer to wait and see."

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I

LECTURES ON THE ENGLISH CONSTITUTION

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Preface

I. Principles underlying the English Constitution.

II. What is Parliament ?

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IV. The House of Lords.

V. The Powers and Privileges of the Lords and the Commons.

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PREFACE

These are lectures on the English Constitution which I delivered to the students of the Government Law College, Bombay, in 1934-35. In publishing these lectures I have not forgotten how presumptuous it may be deemed for an Indian to attempt to expound the principles of the English Constitution. Sir Austen Chamberlain in the course of his cross-examination of a certain Indian witness who appeared before the Joint Committee on Indian Constitutional Reform observed: I listen to the witness with great respect when he talks of Indian conditions, but when he expounds the British Constitution he must permit me to remain of my own opinion (Minutes of Evidence, Vol. 11c, Q. 9812). There is undoubtedly a great deal of truth in this remark and it should make every Indian who wishes to write on the English Constitution pause. An Indian, however, who wishes to enter into the field may well take courage from the fact that much of the English Constitution have been expounded by foreigners who have not only been heard with respect by Englishmen but whose writings have compelled a change of opinion. Be that as it may the remark made by Sir Austen Chamberlain need not come in my way. I am not expounding anything of my own. I am not expounding it to Englishmen. I am merely trying to make Dicey's English Constitution easier for Indian students to follow and to understand. From the stand-point of Indian students Dicey's treatise suffers from two defects. It presupposes a knowledge of certain parts of the English Constitution. For instance it presupposes a knowledge of what is Parliament, how it is constituted and how it functions. This presupposition, howsoever justifiable it may be in the case of Englishstudents, would be without warrant in the case of Indian students who are called upon to take up the study of Dicey for the first time. Without a complete knowledge of this pan of the English Constitution Indian student feels completely bewildered and fails to grasp the full import of such fundamental principles as supremacy of the rule of law or the role of conventions in the working of the Constitution. In order that the Indian student may follow in an

intelligent way the exposition of Dicey regarding the operation of these principles the teacher is forced at every turn to present to the student the framework of the English Constitution which finds no place in Dicey's treatise. Secondly, the English Constitution has grown enormously both as regards rules of law and also as regards conventions since the last edition of Dicey's English Constitution was published. The result of this growth has been felt in two different ways. It has rendered some of the illustrations given by Dicey quite inappropriate. Secondly, it has altered the character of the English Constitution especially the relations of the Crown and the British Parliament to the Dominions to such an extent that an Indian student who depends upon Dicey alone will not be up-to-date but will be missing a great deal that is vital in it. Except for additions of matter and changes of form there is nothing new in these lectures. They constitute a revision of Dicey's treatise on the English Constitution with a view to remove its defects and to adapt it to the needs of Indian students.

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I

PRINCIPLES UNDERLYING THE ENGLISH CONSTITUTION

According to Dicey there are three principles which distinguish the English Constitution from the Constitution of other countries. These principles are :—

(1) The legislative supremacy of Parliament.

(2) The prevalence of the rule of law.

(3) The dependence of the Constitution on the conventions.

Two comments may be legitimately made on the assertion that these principles form distinguishing characteristics of the English Constitution. In the sense that they are not to be found in other Constitutions. One is this. That some of these characteristics have ceased to be true at any rate, to the extent they were true when Dicey wrote. For instance the legislative supremacy of Parliament is to some extent modified and circumscribed by the Statute of Westminster passed in the year 1930. The second comment that must be made that these characteristics, especially the prevalence of the rule of law and the dependence of the Constitution on conventions are not special to the English Constitution. Conventions are a feature of all Constitutions and the rule of law, in one of its senses at any rate, obtains in the United States. All the same it is Constitution in principles form a feature of the English Constitution in a manner and to an extent unknown in other Constitutions. And understood in that sense they no doubt serve to distinguish the English Constitution from other Constitutions.

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(1) LEGISLATIVE SUPREMACY OF PARLIAMENT

One of the first and foremost of foreign Commentators on the English Constitution Hontessquie came to the conclusion as a result of his study that the English Constitution exhibited a feature which was absent from the Constitution of France as it existed at the time when he wrote. He found that under the English Constitution the three organs of the State, namely, the legislative, the executive and the judiciary were distinct and were separated from one another in their composition as well as their functions. Each was limited to its own sphere of activity and was not permitted to invade the dominion of another. Whatever liberty the Englishman had in the days when he was writing and which his countrymen did not possess, was attributed by him to this feature of the English Constitution. So convinced was he of the virtue of this principle of the English Constitution that he propounded it as a vital principle of political organization and recommended it to his countrymen for adoption in their own Constitution. This doctrine of separation of powers of Hontessquie has been laid at the base of every new Constitution made thereafter. This is an interesting illustration of how countries have been misled by the wrong conclusions of a student of politics, for there is no doubt about it that Hontessquie misunderstood the English Constitution. The English Constitution certainly does not recognize the principle of the separation of powers. The King is a part of the legislature, the head of the judiciary and the supreme executive authority in the land. The Ministry which carries on the executive Government of the country in the name of the King are members of Parliament. There is, therefore, no separation between the executive and the legislature. The Lord Chancellor is the working head of the Judicature. He is also a member of the Cabinet. There is, therefore, no separation between the executive and the judiciary. Not only is there no separation between the three organs of the State, but there is no foundation for the statement that their authority is limited by the Constitution for the simple fact that there is no Constitution in the American sense of the

word which allocates the functions of the different organs of the State and delimits their authority. Under the English Constitution there is one supreme authority under the law, and that is Parliament. If the functions of the executive and the judiciary are limited, it does not follow that the functions of Parliament are limited. It only means that Parliament has for the time being allotted certain functions to be discharged by certain bodies, in a certain manner. The limitations of the judiciary and the executive do not result in putting consequential limitation. On the other hand as the limitations proceed from the authority of Parliament, Parliament retains the authority to widen them or to curtail them.

MEANING OF THE LEGISLATIVE SUPREMACY OF PARLIAMENT

A complete idea of the legislative supremacy of Parliament must involve a grasp of the two parts which it must include. The first is that Parliament has, under the English Constitution, the right to make or unmake any law whatsoever. Secondly, no person or a body of persons is recognized by the law of England as having a right to override or set aside the law made by Parliament. It is unnecessary to recall that the words Parliament and law must be understood in their strictly legal sense. Parliament means as has been already explained, the King, the Lords and the Commons, and that none of them individually exercised the authority, belonged to them jointly, so as to make it an Act of Parliament. The term law again must be understood in the strictly legal sense. It means only such rules as are enforced by the Courts. Having stated what is involved in the notion of the legislative supremacy of Parliament, we may next ask what is the proof of this legislative supremacy of Parliament ?

The doctrine of legislative supremacy is accepted by all the lawyers who have written about the English Constitution. Sir Edward Coke, peaking of the power and jurisdiction of Parliament, agreed that it was so transcendent and absolute that it cannot be confined either for causes or persons, within any bounds.

(*4 Institute Page 36*)*

Blackstone the author of the celebrated commentaries agrees that, "Parliament has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws concerning matters of all possible denominations ecclesiastical or temporal, civil, military, maritime or criminal. This being the place where that absolute despotic power, which must in all Governments must reside somewhere, is entrusted by the Constitution of those Kingdoms. All mischiefs and grievances, operations and remedies that transcend the ordinary course of laws are within the reach of this extra-ordinary tribunal. It can regulate the succession to the crown, as was done in the reign of Henry VIII and William III. It can alter the established religion of the land, as was done in a variety of instances in the reigns of Henry VIII and his three children. True it is that "what the Parliament doth no authority upon earth can do."

Delome, a French lawyer agrees with Coke and with Blackstone. He observes, "that Parliament can do everything but make a woman a man and a man a woman".

a woman a man and a man a woman".

This legislative supremacy of Parliament which is acknowledged by all lawyers can be proved by reference to a large number of instances drawn from the history of the British Parliament. But the following may suffice.

(1) *Parliamentary sovereignty and the Acts of Union.*— The Acts of Union with Scotland and Ireland are in the nature of treaties and contain certain clauses which were then regarded as fundamental and essential conditions of Union and which were understood as not being liable to abrogation by the Parliament of Great Britain. The Act of Union with Scotland stipulated that every professor of a Scotch University shall acknowledge and confess and subscribe the confession of faith as his profession of faith. This was regarded as a fundamental condition of the treaty

* Reproduced is per original, page 36 could not he found—ed.

of Union with Scotland. But this very provision has been repeated by the Universities Scotland Act, 1853, which relieves most professors in Scotch Universities from the necessity of subscribing the confession of faith. The Act of Union with Ireland stipulated " that the Churches of England and Ireland as now by law established, be united into one Protestant Episcopal Church, to be called the United Church of England and Ireland, and that the doctrine, worship, discipline and the Government of the said United Church shall be and shall remain in full force forever as the same are now by law established for the Church of England and that the continuance and preservation of the said United Church, as the established Church of England and Ireland shall be deemed and be taken to be an esssential and fundamental part of the Union". There is no doubt that from the language of the clause that it was intended to limit the legislative supremacy of Parliament and yet Parliament by the Irish Church Act of 1869 disestablished the Church in Ireland and its legislative competency to enact such a measure was not questioned.

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The Septenial Act of 1707 is another illustration of the legislative supremacy of Parliament. Under the Act of 1694, the duration of Parliament was limited to 3 years. In the year 1716 a new election was due. But both the King and the Ministry were convinced that under the political circumstances of the day, a new election would be disastrous to the ministry and to the state and ministry of the day persuaded Parliament to pass an Act extending the duration of Parliament from 3 years to 7 years. The House of Commons was accused by the critics of a breach of trust, as representatives of the electors and even the peers joined in the protest on the ground that this Act deprived the people of their remedy against their MP's, who had failed to do their duty. In the wake of political criticism against the Act, the legal connotation was missed altogether. Whether such an Act was proper or improper was one thing. Whether Parliament could alter the law governing its life was another question. It should be noted that while the Act was attacked from the first point of view it was never questioned from the second. Indeed it was taken

or granted that the Septenial Act was within the lagislative competence of Parliament.

There is another feature of the Septenial Act which should be noted because it helps to explain the extent of the legislative supremacy of Parliament. Parliament could have passed a law extending the life of Parliament and probably no question would have been raised if the Act was made applicable to future Parliaments. But the Septenial Act not only extended the life of all future Parliaments, but it also enlarged the terms of the very Parliament which passed the Act. It was undoubtedly an Act of usurpation of political power not contemplated and not given by law to the Parliament which passed the Act and yet such an Act of usurpation was a legal Act. It is unnecessary to go back so far in the past to cite an authority of the Legislative supremacy of Parliament, as the Septenial Act. A similar exercise of the legislative supremacy was resorted to by Parliament during the late war when the sitting Parliament in 1914 instead of dissolving itself passed an Act extending its own life.

Acts of Indemnity are examples which constantly occur and which serve as sharp reminders of the legislative supremacy of Parliament. An Act of Indemnity is a statute the object of which is to free individuals from penalties imposed upon them by law. This is the highest proof of the legislative supremacy of Parliament, for it imports the legalization of an illegality. legalization of an illegality.

INTERFERENCE WITH PRIVATE RIGHTS

Most legislative assemblies confine their legislative powers to the regulation of the rights of the public in general. Private rights and domestic rights are deemed either to be too particular and too sacred to be interfered with by Parliament. But the British Parliament has never accepted these limitations upon its legislative authority. In the case of the lives of the Duke of Clarence and Clocester, Parliament passed an Act declaring that their daughters and wives should inherit their property although they were alive. In the case of the Duke of Buckingham, he was an infant but Parliament passed an Act declaring that he should be

treated as a major for all legal purposes. Sir Robert Playfinston was dead yet long after his death, Parliament passed an Act holding him guilty of treason. The case of the Marquis of Winchester is an illustration in which Parliament by law declared a legitimate child to be illegitimate. A contrary illustration in which illegitimate children born before marriage were declared legitimate, is supplied by the law passed by Parliament in respect of the issues born to Catherine Swinford by John of Gaunt, the Duke of Lancaster. Catherine had, before marriage from the Duke four illegitimate children, Henry, John, Thomas and a daughter, Joan. The King by an Act of Parliament in the form of charter legitimised these children. These illustrations that Parliament cannot only regulate by law the affairs of a single individual but it may also alter the course of general law.

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II

CHAPTER I

WHAT IS PARLIAMENT ?

1. With a large mass of the people Parliament in these days means the House of Commons. It does not include in it the House of Lords, and certainly not the King. This popular notion is due largely to the fact that the House of Commons has become the most dominant element in the working of the English Constitution. But however justifiable such a notion may be, speaking in terms of law it is a wrong notion. Legally Parliament consists of three constituent elements, the King, the House of Lords and the House of Commons, All legislative power belongs to the King, the House of Lords and the House of Commons jointly. It is vested in the King in Parliament, *i.e.,* in the King acting in consent with the two Houses of Parliament. Legally, every Act before it can become the law of the land, requires the King's assent. How important element the King is in the Constitution of Parliament will be evident, if it is borne in mind that the two Houses of Parliament can transact their business only if they are summoned by the King. They cannot meet on their own initiative and authority and transact business. How important place the King occupies will also be obvious if it is remembered that the power to summon, prorogue and to dissolve the Houses of Parliament vests in the King and is exercisable at any time according to his pleasure. On the other hand, it is usually true that without the consent of the two Houses of Parliament, the King has no inherent power of legislation whatever within the United Kingdom. Every act of the King to be law must have the assent of the House of Commons and the House of Lords, unless it is otherwise provided by Statute.

2. The proposition, that all legislative power is vested in the King in Parliament and that no law could be passed without the concurrence of the King, the House of Lords and the House of Commons, is subject to two qualifications.

(1) *The King's veto :*—Although in law the King's assent is necessary to every measure before it can become law, his power to refuse assent, *i.e.,* his power to veto has become absolute by misuse. The right of veto has not been exercised since the days of Queen Anne, who refused her assent to the Scotch Militia Bill of 1707. The impairment of this power of veto by the King is not a legal impairment. In law his power of veto exists in all its amplitude without any qualifications. This is due to forbearance founded on a convention whereby it is settled that when the two Houses agree, the King should not refuse his assent. It's disuse does not mean that it is buried beyond revival. Suppose a ministry resigns after a bill is passed by the House of Commons. The House of Lords insists upon passing the bill in spite of the opposition of the new ministry. It would be rash to assert that in such a case the Royal assent would not be withheld even though both the Houses have concurred in the legislation.

(2) *The veto of the House of Lords:*—The House of Lord was once a co-ordinate and co-equal branch of the legislation, and every measure before it could become an Act of Parliament depended upon it's assent, asmuchas upon that of the House of Commons. Although this was the position in law, the House of Commons had claimed in practice exclusive authority for themselves in finance and an overriding authority in other legislation.

In 1671, the House of Commons passed the following resolution : "That in all aids given to the King by the Commons, the rate of tax ought not to be altered by the Lords."

In 1676, the Commons adapted another resolution as follows: "That all bills granting supplies ought to begin with the Commons, and it is the undoubted and the sole right of the Commons, to direct limit and appoint in such bills the ends, purposes, considerations, conditions, limitations and qualifications of such grants which ought not to be changed or altered by the House of Lords."

In ordinary legislation of a non-fiscal character, the Commons claimed that although the House of Lords might differ from the House of Commons, yet when a conflict arose between the two

Houses the Lords should at some stage wield to the views of the Houses, the Lords should, at some stage, wield to the views of the claim. Even since the Lords had never expressly admitted them, although in practice the Lords conformed to them, the practice was a mere matter of political understanding, a convention and was not reduced to law. The House of Lords was possessed in law of the power of veto, *i.e.,* the right to refuse assent to any measure fiscal or non-fiscal. Here again the case was not one of legal impairment of power. It was a case of forbearance in the exercise of it. In 1910, the House of Lords, contrary to established practive, insisted in asserting their right to refuse assent to the financial proposals in the budget of Mr. Lloyd George. A conflict between the House of Commons and the House of Lords arose. It was settled by the Parliament Act of 1911. The Act is a most important piece of legislation relating to the English Constitution inasmuch as it has affected the veto power of the House of Lords in certain matters in a vital manner.

The Parliament Act of 1911 applies to Public Bills only. It does not apply to Private Bills. In regard to Private Bills, the veto power of the House of Lords remains in tact. Even though this applies to Public Bills it does not apply to all of them. It does not apply to a Public Bill which affects the duration or life of Parliament. Under the Parliament Act the House of Commons retains the power of veto in respect of such bills. In the case of these Public Bills to which it does apply, its effect on the veto power of the House of Lords is not the same. It varies. The Parliament Act divides Public Bills into two classes. (1) Public Bills which are money bills and (2) Public Bills which are not money bills. A money bill is defined as a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely; imposition, repeal, remission, alteration or regulation of taxation, the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund or on money provided by Parliament or the variation or repeal of any such charges, supply, the appropriation, receipt, custody, issue or audit of accounts of public money, the raising or guarantee of

any loan or repayment thereof or subordinate matters incidental to those subjects of any of them. The Act lays down that if a Money Bill having been passed by the House of Commons and sent up to the House of Lords at least one month before the end of the Session, is not passed by the House of Lords without amendment within one month after it is so sent up to that House, the bill shall, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal assent being signified, notwithstanding that the House of Lords have not consented to the Bill.

With regard to other Public Bills, the Parliament Act of 1911 provides that if it is passed by the House of Commons in three successive sessions (whether of the same Parliament or not) and having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of these sessions, that bill shall, on its rejection for the third time by the House of Lords, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal assent being signified thereto, notwithstanding that the House of Lords have not consented to the Bill, provided that this provision shall not take effect unless two years have elapsed between the date of the second reading in the first of these Sessions of the Bill in the House of Commons and the date on which it is passed by the House of Commons in the third of those Sessions.
House of Commons in the third of those sessions.

These are the main provisions of the Parliament Act of 1911. It has altered the character of that veto with regard to a Public Bill other than a money bill by making it a merely suspensory veto which has the effect of merely holding up the legislation passed by the House of Commons during the prescribed period. The power to block legislation, which the House of Lords once possessed as a co-equal member of Parliament, has now been taken away by the Act.

Subject to these deductions, conventional and legal, regarding the authority of the King and the Lords, the proposition that

Parliament consists of King, Lords and the Commons and that without their consent a bill cannot become law, remains as true today as it was before the Act of 1911.

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CHAPTER II

THE CROWN

(1) *The King's title to the Crown.*—Before the Resolution of 1688 when James II fled from the country, it was not certain by what right the King claimed the Crown, whether it was hereditary or elective. But there can be no doubt that thereafter the title to the Crown has become a Parliamentary title, in the sense that Parliament can alter the succession to the Crown. The title to the Crown is at present regulated by the provisions of the Act of Settlement passed in the year 1701. By that Act, the title to the Crown was conferred upon William and Mary and the heirs of their body. The title stipulates two conditions : One, the Successor must be an heir, male or female and two, the Successor must be a Protestant Christian by faith.

(2) *Rights and duties of the Crown.*—The rights of the King are either Statutory or Prerogative. Statutory rights are those which are conferred upon the King by an Act of Parliament. The prerogative rights are the Customary or Common Law Rights of the King which he has been exercising and which have not been taken away by law. It is unnecessary... with those rights and duties of the King which are statutory because they are capable of exact definition and ascertainment by reference to the Statute from which they are derived. The prerogative rights on the other hand are not capable of such ascertainment by reference to any statute because it is of the essence of a prerogative right that is not derived from Statute. Prerogative rights of the King are customary rights and are independent of Statute, and like all customary rights the nature and extent have to be investigated by a Court of Law whenever they are asserted. The King's prerogatives may be conveniently discussed under the following heads :

(A) Personal Prerogatives

(1) *The King can do no wrong.*—All acts are done in the name of the King, but by virtue of this Prerogative, the King is not responsible for any of his acts. The person responsible for his

royal acts are his Ministers. The King, therefore, cannot be sued or otherwise held responsible for his executive acts. When a subject is aggrieved by a breach of contract, he cannot sue the King, nor can he sue the King in respect of a tort. A special provision is made to soften the rigour of the rule which is known as *the Petition of Right procedure*. Under it, a subject aggrieved may petition the Crown for redress and that petition will become justiciable only if the Attorney-General, who is the Law-Officer of the Crown, issues his fiat permitting justice to be done in which case alone, the Courts can proceed with the petition as though it was a plaint in a suit. Even then there are certain rules which though they are binding between private parties, would not be binding upon the Crown, for instance it is a rule that the Crown cannot by contract hamper its future executive actions. As a result, the Crown can always dismiss a servant of the Crown at any time, no matter what the period of contract was, because such a contract would hamper the future executive action of the Crown. Consequently a servant of the Crown cannot sue the Crown for damages for wrongful dismissal even by a Petition of Rights.

(2) *The King never dies*.—The King has the attributing immortality. A particular person wearing the Crown may die. But the King survives. Immediately upon the decease of a reigning King, his Kingship, without any interregnum or interval, vests in his heirs. That is the law, and the popular cry—The King is dead ; Long live the King—is in conformity with the Law. The Coronation ceremony is not necessary to invest the King with Kingly power. A King can act as a King although he has not been coronated, provided he is the next heir of the last King. The Coronation ceremony has no other effect than to proclaim to the subjects and to the world at large, who the King is.

(3) *Lapse of time will not as a rule bar the right of the Crown to sue or to prosecute*.—To put it in a different way, the law of limitation does not apply to the Crown, as it does to a private individual. The private individual must sue or prosecute within a stated period fixed by the law of limitation. The Crown is free from the time-bar. The statement of this prerogative right must

now be qualified so far as the right to sue is concerned. The law of limitation has made the time-bar applicable to the Crown although the period of limitation is sixty years. The Prerogative of the Crown's right to prosecute remains in tact.

(4) When the right of the King and the right of the subject come in conflict, a subject's right must give way to the King's.

(5) The King is not bound by statutes unless expressly named in it.

(II)

Political Prerogatives

Now these may be divided into two categories into which they naturally fall: those which relate to the internal Government of the country and those which relate to foreign affairs. As to the King's Political Prerogatives which relate to the internal Government of the country, they may be considered in relation to the three divisions of State activity, e.g., the executive. the judicial and the legislative. According to the English Constitutional law, the executive Government vests in the King. It is his Prerogative to be the supreme head of the executive. As such, he has the authority to appoint Ministers and other officers of the state political as well as permanent. It is his prerogative to dismiss them. He is also the head of the Army, the Navy, the Air-force and the Civil Service. Every one appointed to discharge the service of the State, no matter how he is appointed, is in law the servant of the Crown. Turning to his Judicial Prerogative, the King at one time actually sat in Court to dispense justice but this Prerogative the King has now lost. The King at one time could create any Court and invest it with jurisdiction to try any matter or any cause he chose to prescribe. The establishment of the Star Chamber and the Court of High Commission by Charles I is an illustration of how wide was the King's judicial Prerogative. But this Prerogative also, the King has now lost. The King can now only create by Prerogative, *i.e.,* without the Sanction of Parliament, Court to administer the Common law. Even this remnant of a Prerogative he cannot exercise, because of the

necessity of financial legislation which such a course would involve, which would make it necessary for him to obtain the sanction of Parliament. Only four bits of his Judicial Prerogatives now remain. (1) He can grant leave to appeal to the Privy Council. (2) He can appoint judges. (3) He can pardon a criminal. (4) He can stifle the prosecution of a criminal, either by declining to offer evidence or by entering a formal *Grote Praseu.*

Coming to the legislative Prerogatives of the King, they extended at one time to vast proportions. The King at one time claimed the power to make laws independently of Parliament, to suspend laws in particular cases and to dispense with them generally. All this has now been altered. The right to suspend and dispense with laws made by Parliament is now completely lost. The right to legislate is also lost, except in so far as it relates to Crown Colonies. The only legislative Prerogatives that remains to the King are the Prerogatives right (1) to summon Parliament, (2) to prorogue Parliament, (3) to dissolve Parliament.

There are two other classes of Prerogatives which relate to the internal administration of the Country which must be referred to before considering the other classes of Prerogatives which relate to foreign affairs. They are Ecclesiastical Prerogatives and Revenue Prerogatives.

Ecclesiastical Prerogatives.—The King is the supreme head of the Church of England as established by law. As the head of the Church, he appoints on the recommendation of the Prime Minister, Archbishops, Bishops and certain other dignitaries of the Church. In his Prerogative right, the King convokes, prorogues and dissolves two Houses of the convocation and it is in his Prerogative right that the King can grant leave of appeal to the Privy Council from the decisions of the ecclesiastical Courts.

Revenue Prerogatives.—The revenues of the British Government fall into two classes, (1) the ordinary revenues and (2) the extraordinary revenues. The ordinary revenues are called the Prerogative revenues and they are derived from the following sources, (1) The custody of a Bishop's temporalities, *i.e.,* the

right of the King to take the profits which the episcopal sea is vacant, though these are held in trust for his successor. (2) The rights to annates and tenths. Annates were the first year's profits of church's benefits formerly paid to the Pope and afterwards to the Crown. Tenths were the tenth part of the annual profits of a church's benefit formerly paid to the Pope. These are now paid to the Governor of the Queen Anne's Bounty. (3) Profits derived from the Crown lands. (4) The right to Royal fish wreck, treasure-trove, waifs and cotrays, royal mines and escheats.

The foregoing items constituting the ordinary revenues of the Crown were collected by Prerogative and paid to the King until 1715 when the first Civil Lists Act was passed whereby an arrangement was made between the King and Parliament whereby the King surrendered his Prerogative revenues to the state which are since then paid into the Consolidated Fund and Parliament in consideration of this assignment granted to the Royal family for its maintenance a fixed sum, which is made an annual charge upon the Consolidated Fund and is called the Civil List. The Civil List is not a permanent arrangement but is a temporary agreement made between the reigning King and the Parliament and lasts during the life-time of that King. When a new King succeeds, a new agreement is made with him which again is to last during his life-time. If no agreement is made, the Prerogative of the King in respect of the ordinary revenue will revive. The Civil List arrangement does not abrogate it in any way. It merely affects the appropriation of the revenue. It does not affect the right to raise that revenue.

II. The King's Prerogatives in relation to the foreign relations of the Country.

The King possesses the right and the power to receive Ambassadors of foreign Countries and to send his Ambassadors to them. This is his Prerogative right. The right is important because of the immunity from Civil and Criminal process which Ambassadors, who are recognized as such by the King, enjoy. What those immunities are will be discussed at a later stage. It is enough here to note that they depend upon the recognition by

the King of a person as an Ambassador and that recognition is a Prerogative Right of the King.

The King has also the right to make war and peace whenever he thinks fit to do so. This also is his Prerogative right.

The King possesses the power to make a treaty with any foreign nation. The treaty may be a political treaty or a commercial treaty. It is his Prerogative. The only limitation upon the King's Prerogative to make a treaty is that he must not in any manner affect the rights of his subjects given to them by law.

There are some questions that arise in connection with the question of the King's Prerogatives and which it would not be desirable to pass over without some consideration being bestowed upon them. The first question is this. What is the exact relation of the King's Prerogative to the authority of Parliament ? The second question is what happens if the King becomes incapable of exercising his Prerogative or other Statutory rights ?

Taking the first inquiry for consideration it is necessary to get a clear idea of what is exactly meant when it is said that it is the King's Prerogative to do this, that or other act. What is meant by this expression, that when the King acts on the authority of his Prerogative, he does not need the sanction of Parliament. His authority is inherent in him and is independent of Parliament. But while it is true that the Prerogative power of the King is inherent and independent of Parliament, it must not be supposed that it is on that account beyond the control of Parliament. On the other hand the Prerogative power of the King can be regulated, amended or abrogated by Parliament, so that the correct position would be that the King possesses Prerogative power so long as Parliament has not by law trenched upon it. A matter which was once a matter of Prerogative if subsequently regulated by law made by Parliament, then the King cannot resort to his Prerogative power, but must act within the law which has superseded the Prerogative. Therefore, so far as the first inquiry is concerned, the conclusion is that the King's Prerogative is a source of independent power to him so long as Parliament has not interfered with its existence.

What happens if the King becomes incapable of exercising his Prerogative and other Statutory rights. Now this is no idle inquiry because there are certain important duties which are attached to the Kingly office and the King may become incapable of discharging them. Four contingencies of incapacity may be visualized. (1) The King may be absent from his Kingdom. (2) The King may be a minor. (3) The King may be insane. (4) The King may be morally incapable.

The absence of the King from the Kingdom cannot raise any very great difficulty. Modern means of communication have annihilated distance and have facilitated quick dispatch. The King, therefore, could discharge his Kingly duties from a distance with expedition at any rate without delay. There is also the other possibility of the King delegating his powers to somebody who could exercise them on his behalf when he is away.

Minority of the King cannot create any difficulty so far as the law is concerned. The law holds that the King is never an infant and is capable of transacting business even though he is a minor. A minor King, therefore, can exercise all his powers and discharge all his duties lawfully. Ordinarily if the reigning King is expected to die leaving an infant as his heir, Parliament always takes the precaution of appointing by law a regent. But this is by way of prudence and not by way of any requirement by law.

Insanity makes a hard case. The King cannot delegate his powers if he is insane. Parliament cannot pass a law, appointing a regent because the King being insane cannot give his assent to the Bill. There are two cases of English Monarchs having gone insane, while on the throne, Henry VI (1454) and George III (1788). The procedure then adopted was a very crude one and certainly could be deemed to be strictly in conformity with the law of the Constitution, which requires the assent of all three elements which constitute Parliament.

The moral incapacity of the King is another hard case. Can the King resign supposing people do not want him ? Can the King be deposed if he does not resign ? There is no legal provision regulating the insanity or the moral incapacity of the

King. Question of moral incapacity may not perhaps arise under the English Constitution owing to the development of responsible Government. But the question of insanity might.

Effect of the death of the King

I. On Parliament

The original rule was that Parliament was automatically dissolved by the death of the King. The Constitution and theory of which this was a consequence regarded members of Parliament as councillors of the King who summoned them. The tie of summons was regarded as a personal tie between the King who summoned and the members who assembled in return and that tie was broken by the death of the King. The members called by deceased King could not be on this account be called the councillors of the new King, and the King was entitled to call new councillors, which could happpen only when the old Parliament was dissolved and the new King obtained an opportunity to call a new Parliament. This rule was first amended in * by 7-8 William III Chapter XV whereby it was provided that the existing Parliament was to work for six months after the death of the King if not sooner dissolved by his successor. Subsequently in the year 1867, (30, 31 Victoria, Chapter II 102), the rule was altogether abrogated and the life of Parliament was made independent of the death of the king.

II. On the tenure of office

The original rule was that all executive officers were to vacate their offices on the death of the King, and for the same reasons whereby the death of the King resulted in the dissolution of Parliament. Here again the law has gradually altered the theory. The Succession to the Crown Act of 1707 extended the tenure of executive Officers to six months after the death of the King. By another Act passed in the year * the period was again extended and finally the Demise of the Crown Act of 1901 made the tenure of office independent of the death of the King.

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IV

CHAPTER III

THE HOUSE OF LORDS

The House of Lords consists of three different classes of Peers. (1) Hereditary Peers of England and United Kingdom, (2) Representative Peers and (3) Peers by virtue of Office.

The first question that must be raised and answered in order to understand the Constitution of the House of Lords is this. What is the title of the Peers to sit in the House of Lords ?

Peers of England and the United Kingdom

The title of the English Peers and the Peers of the United Kingdom is founded on the King's writ of summons addressed to each Peer individually to come and to attend Parliament. The English Peerage is created by the King by Letters Patent. No difficulty arises, therefore, with regard to persons holding Peerage by Letters Patent. The only question that arises is whether the King could create a Peerage for life. This was at one time a matter of controversy and the controversy was whether a life-Peer created by the King entitles the Peer to sit in the House of Lords. But the issue was decided finally in the Weynesdale Peerage case in 1856 in which two things were decided. (1) That the King had the right to create any class of life-peer or hereditary but (2) the life-Peer cannot sit as a member of the House of the Lords and the King could not send such a Peer a writ of summons. The reason assigned was that the hereditary character of the Peerage was by custom, if not by law, an integral feature of the Peerage and the King while entitled to exercise his right to create a Peerage was not entitled to abrogate the custom.

What about the right of the Peers whose Peerage was not created by Letters Patent ? Their right also was founded upon the King's writ of summons.

Two questions, however, were long agitated with regard to the writ of summons to such Peers. Could every Peer claim the writ of Summons ? Was the King free to address or not to address

the summons to any Peer? On behalf of the Peers it was contended that only Peers who held their Peerage by what is called tenure by Barony were entitled to summons and that no other Peer was entitled to summons, nor was the King free to address the summons to a Peer who fell outside that class. On the other hand it was contended on behalf of the King that the writ was not a special privilege confined to Peers by Barony nor was there any limitation upon the King's right to address the summons to the Peers. The controversy was in the long run settled and two rules can now be laid down as rules governing the right to writ by Peers whose Peerage is not evidenced by Letters Patent.

(1) Tenure by Barony is no ground for a claim to a writ from the King.

(2) The King was bound to summon by a writ to sit in the House of Lords a descendant of a person, who had received a writ and taken his seat in that House in accordance therewith. In other words the descendant of a person, however distant and whatever the break in the interval, who can be proved to have received a writ from the King can claim a similar writ by a hereditary right. The English Peerage, therefore, is a hereditary Peerage and all heriditary English Peers are, therefore, entitled by their hereditary right to a writ of summons from the king and be members of the House of Lords.

(3) Although the right is a hereditary right it is subject to two rules, (1) The rule of Primogeniure and (2) The rule of male descendant.

Representative Peers

The representative peers fall into two classes. Representative Peers of Scotland and representative Peers of Ireland. The title of the representative Peers of Scotland is founded on the treaty of Union between England and Scotland which took place in 1707 and which made them into a Common Kingdom under a Common King and was called the United Kingdom of Great Britain. Prior to its Union with England, Scotland had its own Peerage with its hereditary right to sit. The Union of Ireland with Great Britain

took place in 1800. As in the case of Scotland, Ireland has also its own Peerage with hereditary right to sit in the old Irish Parliament. On the amalgamation of Ireland and Scotland by their respective treaties of Union with England, the question arose as to how much representation was to be allowed to the old Scottish and Irish Peers in the new Parliament of Great Britain and Ireland. The English Peers claimed for every one of themselves the right to sit in the new Parliament. The Scottish and the Irish Peers claimed similar right for every member of their own class.

In the settlement that was arrived at, it was agreed (l)that the English Peers should be allowed each to sit in the new Parliament. (2) The Scottish Peers were allowed to elect sixteen (16) out of their number as their representatives in the new Parliament. (3) The Irish Peers were allowed to elect 28 out of their number. The Scottish Peers are elected for the duration of a single Parliament. When Parliament is dissolved, there takes place a new election of the 16 representative Scottish Peers by the Peers of Scotland. The Irish representative Peers on the other hand are elected for their lives, and there is no new election of Irish Peers when Parliament is dissolved. A new election takes place only when a vacancy takes place in the representative Irish Peers by death or by any other disqualifying cause.

In addition to these three ancient territorial Peerages existing from before the time of the Union, there has been created a fourth category of Peerage known as the Peers of the United Kingdom with a right to sit in the House of Lords. Such a Peerage could be conferred by the King even on a Scottish Peer or an Irish Peer in which case if the Peerage is hereditary, the holder would be entitled to sit in the House of Lords notwithstanding of the treaties of Union with Ireland and Scotland.

Peers by virtue of Office

The Peers who sit in the House of Lords by virtue of office fell into two divisions (1) The Lords spiritual and (2) the Lords of appeal in ordinary. By law twenty-six, officials of the Church are

entitled to sit in the house of Lords. Of these, the Archbishops of Canterbury and York and the Bishops of London, Durham and Winchester have the right to sit in the House of Lords as Lords Spiritual. Of the remaining 21 spiritual Peers, 21 diocesan Bishops in order of seniority of appointment have a right to sit in the House of Lords. So when one of the 21 Bishops dies or resigns, his place in the House of Lords is taken not by his successor but by the next senior diocesan Bishop.

The Lords of Appeal in ordinary

The House of Lords, besides being a Legislative Assembly, is also a Court of Judicature. It is for most purposes, the final and the highest Court of Appeal from the King's Courts in England, Scotland and Ireland. This judicial function being the function of the House of Lords as such, there is nothing to prevent any Peer of Parliament from taking part in the decisions of any appeal that would be brought before the House in its judicial capacity. The House of Lords in the main is a body of lay Peers not versed in the intricacies of law and not possessing any legal training. To allow such a body to permit to discharge the functions of the highest Judiciary involved a great danger to the cause of justice. It was, however, not possible to take away this jurisdiction from the House of Lords altogether. As a compromise, the Act of 1876 called the Appellate Jurisdiction Act was passed. It retained the Jurisdiction of the House of Lords as the final Court of Appeal but provided that no appeal should be heard and determined by the House of Lords unless there were present at such hearing and determination at least three Lords of Appeal. The Lords of Appeal consist of (1) The Lord Chancellor for the time being, (2) such sitting Lords in the House as have held high judicial office and (3) the Lords of Appeal inordinary, appointed by the King.

The Appellate Jurisdiction Act of 1876 which gave the power to the Crown to appoint Lords of Appeal inordinary to sit in the House of Lords, made the tenure of those Lords of Appeal as Peers dependent on the continuance of his discharge of his judicial functions as a Lord of Appeal. In 1887, however, this was altered and the tenure of a Lord of Appeal inordinary is now a life tenure.

Having stated the composition of the House of Lords, we may next proceed to consider certain questions that arrive in connection therewith. The first is this. What is the title of the Peers to sit in the House of Lords ? The title of the Peers to sit in the House of Lords is not founded upon election by a Constituency as is the case with the members of the House of Commons. Their title is founded by a writ of summons addressed to each Peer individually to come and attend Parliament. It is a kind of nomination by the King although the power to nominate is strictly regulated and does not leave any discretion in the King to revoke and alter the course of nominations from Parliament to Parliament

While the right of the Peer is founded on the writ of summons issued by the King, there are certain restrictions on the King's right to summon Peers. An Alien Peer that is a Peer who is not a British subject cannot be summoned to sit in Parliament

A second question that must also be considered relates to the admissibility and divesting by the Peer of his title. A Peerage is a non-transferrable dignity and the title to it cannot be transferred by sale or by gift to another. It can be claimed by another only by inheritance in accordance with the rules of heritage. Similarly a Peer cannot surrender his title and cease to be a Peer. The principle which govern the Peerage is, once a Peer always a Peer.

A third question must relate to the difference between Peerage and the House of Lords. Popularly the expression Peers of the Realm and the House of Lords are used synonymously. Legally speaking there is a difference between the two. A person may be a Peer of the Realm and yet not be a member of the House of Lords. The case of a life-Peer is an illutration in point. A life-Peer is a Peer of the Realm and yet he cannot be a member of the House of Lords, because of the rule that the Peer who is a Peer otherwise than by virtue of office must be a hereditary Peer in order that he may get a right to sit in the House of Lords. Contrariwise, a person may be a member of the House of Lords, although he is not a hereditary Peer. The case of the spiritual Lords and the Lords of Appeal inordinary is an

illustration in point. The Archbishops and Bishops as also the Lords of Appeal inordinary are entitled to writ of summons from the King to the House of Lords, the former while they hold their offices and the latter during their life-time. Yet they are not Peers in the legal sense of the term inasmuch as Peerage connotes a hereditary right

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V

THE POWERS AND PRIVILEGES OF THE LORDS AND THE COMMONS

Both Houses of Parliament enjoy certain privileges in their collective capacity as constituent parts of Parliament and which are necessary for the support of their authority and for the proper exercise of their functions. Besides the privileges enjoyed collectively as members of the two Houses of Parliament, there are other privileges enjoyed by members in their individual capacity and which are intended to protect their person and secure their independence and dignity.

SECTION I

(I) PRIVILEGES OF PARLIAMENT

(1) **Privileges of the House of Commons.—**The right to exclude strangers and to debate within closed doors is one of the privileges claimed by the House of Commons. The origin of this privilege lies in the existence of two different circumstances. One circumstance related to the seating arrangements for members in the House of Commons, which was so defective that strangers and members of Parliament were often mixed together. The result was that the strangers were often counted along with the members in divisions. To prevent this, the House claimed the right to exclude strangers. The second circumstance related to the system of espionage practised by the King over members of the House of Commons. In those days, as reporting of the speeches by the members in the House had not become systematic the King was anxious to know who were his friends and who were his enemies, employed spies, whose duty it was to report to the King the speeches made by members on the floor of the House. This was followed by intimidation of the members by the King or by other acts of displeasure, which had the effect of curtailing the independence of the members. And the only way by which the House could protect itself against the system of espionage practised by the King was to claim the right to exclude strangers.

Under this privilege it did not follow that strangers could not enter the House and listen to the debates. As a matter of fact, they did enter and listen to the debates. The effect of the privilege was that if a member took notice of their presence, the Speaker was obliged to order them to withdraw. This worked inconveniently because the objection of one member to the presence of strangers was enough to compel the Speaker to order them to withdraw. In 1875, therefore, the rule was altered by a resolution of the House, which prescribed that if any member took notice of the presence of the strangers or to use technical language rose to address the Speaker "Sir, I spy strangers", the Speaker shall forthwith put the question that strangers be ordered to withdraw without permitting debate or amendment and take the sense of the House and act accordingly. This resolution while retaining the privilege of excluding strangers, makes its exercise subject to the wishes of the majority of the House, and not to the caprice of an individual member. The rule, however, gives the Speaker the power to order the withdrawal of strangers at any time on his own initiative and without a motion from any member of the House.

The House of Commons claims the privilege of secrecy of debates and have the right to prohibit the publication of their debates and their proceedings. In 1771, an incident occurred which put the privilege beyond debate. A certain printer who resided in the city of London printed the debates of the Commons without their permit. The Commons having taken offence at this breach of their privilege, sent a messenger under the authority of the Speaker to arrest the printer. The printer in his turn handed over the messenger of the House of Commons to the custody of a constable for assaulting him in his own house. In the criminal proceedings that took place, the Mayor and the two aldermen of the city of London who constituted the bench held that the warrant of arrest issued by the House of Commons was not operative within the city on account of its charter and committed the messanger of the Commons though they left him out on bail. The Commons sent for the Mayor and the aldermen who constituted the bench and their clerk who recorded the recognisance of the messenger in his book. They erased from the book

the entry relating to the messenger's recognisance by tearing the page and committed the Mayor and the aldermen to the Tower of London for challenging the authority of the Warrant. Since then no one has ventured to offend against the privilege of the Commons relating to the secrecy of debates. The reports of the debates which one sees today are made on sufferance and published on sufferance, and they could be prohibited any time by the order of the House in that behalf. This was done on some occasions during the last war when many subjects were discussed on the floor of the House in secrecy without any reports being published of the debates.

Another privilege which the House of Commons claims is the right to provide for the proper Constitution of the House. Under this privilege, falls the consideration of three distinct questions.

(1) Filling of Vacancies.—While the holding of a general election for the summoning of a new Parliament is a Prerogative of the King, the filling up of vacancies during the continuance of a Parliament is a privilege of the House of Commons. Consequently, when a vacancy occurs, the writ for the return of a member to supply the vacancy is issued on a warrant by the Speaker in pursuance of an order by the House and not in pursuance of an order from the King. If Parliament is not sitting when the vacancy occurs, the Speaker is authorised to issue the writ subject to certain conditions.

The second question that falls within this privilege is the determination of disputed elections. This question formed for a long time a bone of contention between the King on the one hand and the Commons on the other. Each party claimed the right for itself to the exclusion of the other. Originally the writ issued to a constituency for an election was returned to Parliament, thereby recognizing the right of the Commons to fill a vacancy in that particular constituency. Since the reign of Henry IV, it was returned to Chancery, thereby recognizing the right of the King to fill the vacancy. The matter thus alternated till 1604 when the Commons insisted that the right was theirs and a quarrel arose between them and James I. In that year, the King James I issued a proclamation directing that no bankrupt or out-law be elected to

Parliament. The County of Bucks elected one Mr. Goodwin. He was an outlaw and the King declared his election void and issued another writ. And Mr. Fortesque was returned. The Commons on their own motion resolved that notwithstanding the avoidance of his election by the King, Mr. Goodwin was duly elected a member of the House. The King on the other hand claimed the right to determine the issue. At a conference held between the King, the Lords and the Commons, the Lords advised the King to accept defeat and recognise the right of the Commons. The trial of disputed elections by the House became a source of trouble to the House and anxiety to the candidates because all such trials became matters of party politics and in 1868 the House was pleased by law to leave the adjudication of disputed elections to the Court of Law.

The third right which falls within the purview of this privilege is the right of the House to expel a member who has behaved in a manner which would render him unfit to sit in the House. Expulsion is not a disqualification and the member expelled may be again elected. It must be borne in mind that the right to be elected does not carry with it the right to sit. To be elected is a favour derived from the electors. To be allowed to sit is a favour within the competence of the House and cases have occurred in which persons have been duly elected to the House of Commons but who have not been able to take their seats in the House. The case of Wilkes is an illustration in point. Wilkes was elected four times in succession by the County of Middlesex and on all the four times, he was refused by the House a seat. The next important privilege claimed by the House of Commons is the right to exclusive cognisance of matters arising within the House. Under this privilege, the House has the exclusive right to regulate its internal proceedings and concerns and the mode and manner of carrying on its business and that no Court could take cognisance of that, which passes within its walls. The nature and extent of this privilege are well-illustrated by the case of *Bradlaugh* vs. *Gosset*. The facts of this case are simple. On the 3rd of May 1880, Mr. Bradlaugh, who was elected a member from Northampton claimed to make the affirmation instead of the oath as he was an atheist. A Committee of the House of Commons

reported that affirmation was confined to proceedings in a Court of Law and that the members of Parliament could not resort to it. Oath was the only thing that was open to them. After this report, Mr. Bradlaugh came to the Speaker's table to take the oath. The house, however, objected on the ground that it would not be binding upon his conscience, and that it would be a mere formality. Another Committee was appointed to report whether Mr. Bradlaugh should be permitted to take the Oath. The Committee reported that he should not be permitted to take the oath but recommended that he should be allowed to affirm subject to its legality being tested in a Court of Law. In accordance with this, a motion was made to allow Mr. Bradlaugh to affirm to which an amendment was made disallowing him either to affirm or to take oath. Bradlaugh, however, insisted upon his right to take the oath, but the Speaker asked him to withdraw. He refused and the sergeant was asked to remove Mr. Bradlaugh. A scuffle ensued between Mr. Gosset, the sergeant and Mr. Bradlaugh in which Mr. Bradlaugh was very badly injured. A standing order was passed allowing affirmation. Mr. Bradlaugh affirmed but the Court declared that affirmation was not permissible to a member of Parliament. His seat was thereafter vacated. Re-elected again in 1881, the same scene was repeated. Whenever he came to the table to take the oath, the House resolved that he be not allowed to do so. On one occasion by the direction of the Speaker, Mr. Bradlaugh was conducted by Sergeant Gosset beyond the precise of the House and subsequently expelled. Bradlaugh brought an action against Gosset in the Queen's bench division for an injunction to restrain Gosset from using force to prevent his taking the oath. The House made the usual order for the defence of the sergeant. The Queen's bench division refused relief to Mr. Bradlaugh on the ground that the order under which Gosset acted related to the procedure of the House and that the Court had no power to interfere in such a matter.

The House of Commons claims the privilege to protect its dignity and authority. It would be in vain to attempt any enumeration of the acts which might be construed by the House as an insult

or an affront to its dignity. But certain principles may be laid down :

(1) Disobedience of any of the orders or rules which regulate the proceedings of the House is a breach of the privilege. Publication of debates contrary to the resolution of the House, wilful misrepresentation of the debates, publication of evidence taken before a select Committee until it has been reported to the House are examples of the breach of this rule.

(2) Disobedience to particular orders. Resolutions are agreed to at the beginning of each session which declare that the House will proceed with the utmost severity against persons who tamper with witnesses in respect of evidence to be given to the House or to any Committee thereof, who endeavour to deter or hinder persons from appearing or giving evidence and who give false evidence before the House on any Committee thereof, would be guilty of breach of privilege by reason of disobedience to particular orders.

(3) Indignities offered to the character or proceedings of Parliament or upon the honour of the House by libellous reflections would be a breach of the privilege. It is not to be supposed that only members of the public can be held guilty for a breach of privilege under this rule. Even members of Parliament could be made punishable if they commit the breach of this rule. In 1819, Mr. Hobhouse, who was an M.P., denounced the resistence offered by the House of Parliamentary Reforms, in a pamphlet which he published anonymously. After his having acknowledged himself as the author of the pamphlet, the House held him guilty of the breach of privilege. In 1838, another instance occurred when Mr. Ocomed an M.P. at a public meeting laid a charge of foul perjury against members of the House in the discharge of their judicial duties in election committees.

(4) Interference with the members of the House in the discharge of their duties as members of the House.

It is an infringment of the privilege of the House to assault, insult or menace any member of the House in his coming or going from the House or on account of his behaviour in Parliament or to endeavour to compel members by force to declare themselves in favour of or against any proposition then pending or expected to be before the House or bribing members of parliament to vote in a particular manner.

SECTION II

PRIVILEGES OF INDIVIDUAL MEMBERS

(1) *Freedom from arrest.*—This privilege guarantees freedom from arrest for members during the continuance of the session and 40 days before the commencement and after its conclusion. Originally this privilege was not only enjoyed by members but also extended to their servants and their estates. It is now restricted to members only and that too to their persons.

(2) *Freedom of speech.*—The statute of William and Mary S2 C2 enacts that members shall enjoy complete freedom of speech in Parliamentary debates and proceedings and that nothing said by them shall be questioned or impeached in any Court or place out of Parliament.

SECTION III

METHODS OF PUNISHING BREACHES OF PRIVILEGE

There are five different ways in which the House can punish persons who are guilty of a breach of privilege. In cases of breach of privilege which are not grave, the House may release a person arrested for breach of privilege on mere admonition if he is prepared to tender apology. Or secondly, may release him on a reprimand. In cases of a grave character, the House can commit him to prison or inflict a fine or expel him. It is obvious that the last form of punishment namely, expulsion, can apply only to members of parliament who are guilty of a breach of privilege.

SECTION IV

PRIVILEGES OF THE HOUSE OF LORDS

The privileges of the House of Lords are more or less the same as those of the Commons. It is, therefore, unnecessary to discuss them separately in detail. There is only one point of difference between the privileges of the Lords and the Commons which need to be mentioned and which relates to the source of their privileges. The privileges of the Commons are a gift from the

King. They have to be claimed by the Speaker in the name of the Commons in the beginning of every newly elected Parliament. The privileges of the Lords belong to them in their own right. They are not derived from the King.

*SECTION V

OFFICERS OF THE HOUSE

The House of Lords and the House of Commons possess ertain Officers for the general conduct of their business and for the enforcement of their privileges. For the sake of clarity it might be desirable to discuss the status and the functions of the Officers of the two Houses separately.

†SECTION VI

THE HOUSE OF COMMONS

(1) **The Speaker.**—The Speaker is now elected by the House of Commons at its first meeting after the general election and continues to hold the place till the life-time of the Parliament unless removed from Office by a resolution. Originally the King claimed and exercised a virtual right of selection. In 1679, there arose a conflict between the Charles II and the newly elected House of Commons on the right to choose the Speaker. The Commons chose Sir Edward Sey Mour and the King declined to accept him. The King suggested his own nominee to the Commons and the Commons in their turn refused to have him. Eventually a compromise was arrived at, and another person who was an independent choice of the Commons was adopted by them as their Speaker. To him the King raised no objection. From this time onward, the right of the Commons to chose their own Speaker was not contested by the Crown.

SECTION VII

THE FUNCTIONS OF THE SPEAKER

The Speaker of the House of Commons functions in three distinct capacities. As the Spokesman and representative of the House he performs the following duties.—

(1) He demands its privileges and communicates its resolutions of thanks, ensures admonitions and reprimands.

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* Original No. is Section VI—ed.

† Section number is not mentioned in M.S.—ed.

(2) He issues warrants of commitments whenever a person is punished for breach of privilege. He issues warrants for attendance at the bar for being rebuked or sentenced by the House or for any other purpose as provided for in the order of the House.

(3) He issues writs for filling up vacancies.—The Parliament Act of 1911 has imposed upon the Speaker a new function which did not belong to him before. Under the Act, he the functions as a judicial officer and in that capacity he has to certify whether any particular bill is a money-bill or not

The Speaker is also the Chairman of the House whenever the House meets to carry on its business. In his capacity as a Chairman he is required:

(1) To maintain order in debates.

(2) To decide questions upon points of order.

(3) To put the question under discussion to the House.

(4) To declare the determination of the House on the question.

SECTION VIII

OFFICERS UNDER THE SPEAKER

There are two Officers under the Speaker of the House of Commons. One is called the clerk of the House of Commons and the other is called the Sergeant at arms. The duty of the clerk of the Commons is to maintain a record of the proceedings of the House. He maintains what is called the journal of the House of Commons in which are noted all matters brought before the House and discusses by it in their order from day-to-day.

The Sergeant at arms is a sort of a Police Officer whose duty is to enforce the orders of the House and the Speaker in relation to internal order and to breach of privilege.

THE HOUSE OF LORDS

The Speaker.—The Speaker of the House of Lords is not an elected person and the House of Lords has no right to elect its own Speaker. The Speaker of the House of Lords is by prescription the Lord Chancellor or the Lord Keeper of the Great Seal, who can act as Speaker in the absence of the Lord Chancellor. In their absence the place is taken by any one of the Deputy-Speakers

of whom there are always several appointed by the King's Commission and if they should all be absent, the Lords elect a Speaker for the time being. The Speaker of the House of Lords need not necessarily be a Peer, and that office may be discharged by a commoner and has been so discharged when a commoner happened to be the Lord Keeper of the Great Seal or when the Great Seal was in commission. It is singular that the President of this deliberative body is not necessarily a member of it, and the Woolsack on which the Speaker sits is treated as being outside the limits of the House of Lords, so as to permit the office being discharged by a person who is not a member of the House.

THE DUTIES OF THE SPEAKER IN THE LORDS

The position of the Speaker of the House of Lords is totally different from the position of the Speaker of the House of Commons. There is nothing common between them as far as their authority and function is concerned except that both are Chairmen of a deliberative assembly. But so far as their function and authority is concerned, their position is fundamentally different. This is clear from standing order No. 20 which defines the duties of the Lord Chancellor as a Speaker of the House of Lords. The standing order says: "The Lord Chancellor when he speaks to the House is always to speak uncovered and is not to adjourn the House or to do anything else as mouth of the House, without the consent of the Lords first had, except the ordinary thing about bills which are of course wherein the Lords may likewise overrule, as for preferring one bill before another and such like, and in case of difference among the Lords, it is to be put to the question, and if the Lord Chancellor speak to anything particularly, he is to go to his own place as a Peer" and be it noted that the place of the Lord Chancellor if he is a Peer is to the left of the Chamber. It is clear from the standing order how limited is the authority of the Speaker in the Lords.

(1) In the enforcemment of rules for maintaining order the Speaker of the House of Lords has no more authority than any other Peer.

(2) He cannot decide points of order as is done by the Speaker of the House of Commons. If he is a Peer he may address the House on any point of order raised. But the decision on it is the decision of the Majority of the House.

(3) Owing to the limited authority of the Speaker in the Lords in directing the proceedings of the House, the right of a Peer to address the House depends not upon him as it does in the House of Commons but depends solely upon the will of the House. When two Peers rise at the same time, unless one immediately gives way to the other, the House calls upon one of them to speak and if each is supported by a party, there is no alternative but division. The issue is not decided by the Speaker, as is done in the House of Commons.

The result of his imperfect powers is that a Peer who is disorderly is called to order by another Peer perhaps of an opposite party and that an irregular argument is liable to ensue in which case, each last Speaker imputes disorder to his predecessor and recrimination takes the place of an orderly debate with the Lord Chancellor sitting but powerless to intervene, as his power is limited to the putting of questions and carrying on other formal business.

OTHER OFFICERS

There are three other officers under the Lord Chancellor as Speaker of the House of Lords.

(1) **The clerk of the Parliament.**—His duties are similar to those of the clerk of the House of Commons, namely, to keep the record of the proceedings and judgments of the House of Lords in a journal.

(2) **The Gentleman Usher of the Black rod,** whose duties are analogous to those of the Sergeant at arms in the House of Commons. He does the policing of the House.

(3) **The Sergeant at arms** is the attendant on the Lord Chancellor.

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II

PARAMOUNTCY AND THE CLAIM OF THE INDIAN STATES TO BE INDEPENDENT

The announcement by Travancore and Hyderabad to declare themselves Independent Sovereign States on 15th of August when India becomes a dominion and the inclination shown by other States to follow their example has created a new problem. The problem is a crucial one and requires to be seriously considered. There are two aspects to the question. Can the States declare themselves Independent ? Should they declare themselves Independent?

To begin with the first. The basis of the claim made by the States for a right to declare themselves independent lies in the Statement of 12th May 1946 issued by the Cabinet Mission in which they say that the British Government could not and will not in any circumstances transfer paramountcy to an Indian Government which means that the rights of the States which follow from their relationship to the Crown will no longer exist and that all the rights surrendered by the States to the paramount power will return to the States. The Statement of the Cabinet Mission that the Crown could not transfer paramountcy is obviously not a statement of political policy. It is a statement of law. The question is, is this a correct statement of the law as it applies to the States ?

There is nothing original in the proposition set out by the Cabinet Mission. It is a mere repetition of the view propounded by the Butler Committee appointed in 1929 to examine the relationship between the Crown and the Indian States.

As students of the subject know the Princes in the stand they took before the Butler Committee contended for two propositions:—

(i) That Paramountcy could not override the terms and conditions contained in the Treaties between the Princes and the States but was limited by them.

(ii) That the relations embodied in Paramountcy were of a personal nature between the Crown and the Princes and could not, therefore, be

transferred by the Crown to an Indian Government without the consent of the Princes.

The Butler Committee repudiated the first of these two contentions. It put the matter in most ruthless language by declaring that Paramountcy was Paramount and was not limited by any terms contained in the Treaties. As regards the second contention, strangely enough, the Butler Committee upheld. Whether it was to appease the Princes who were annoyed with the Committee for turning down the Princes' contention regarding Paramountcy it is no use speculating. The fact, however, remains that it gave immense satisfaction to the Political Department of the Government of India and to the Princes.

The doctrine that Paramountcy cannot be transferred to an Indian Government is a most mischievous doctrine and is based upon an utter misunderstanding of the issues involved. The doctrine is so unnatural that the late Prof. Holdsworth, author of the History of English Law, had to exercise a great deal of ingenuity in defending it in the pages of the Law Quarterly Review for October 1930. Unfortunately, no Indian student of Constitutional Law has ever bothered to controvert his views with the result that they have remained as the last and final word on the subject. No wonder the Cabinet Mission adopted them as valid and acted upon them in settling the issue of British India *vs.* Indian States. It is a pity that the Congress Working Committee, which was negotiating with the Cabinet Mission for a settlement, did not challenge the proposition enunciated by the Mission in regard to Paramountcy. But these circumstances cannot take away the right of Indians to examine the matter *de novo* and come to their own independent judgment and stand for it if they are convinced that their view is the right view, no matter what the Cabinet Mission has said.

The case against the position taken by the Cabinet Mission in regard to Paramountcy can be stated in the following propositions :—

(1) Paramountcy merely is another name for what is called the prerogative of the Crown. It is true that Paramountcy as a prerogative of the Crown differs from the ordinary prerogative of the Crown in two respects—(a) The basis of the ordinary prerogative of the Crown lies in

Common Law as distinguished from Statute Law while the basis of the Prerogative arising from Paramountcy lies in treaties supplemented by usage, (b) the Common Law prerogative of the Crown extends to all the subjects of the Crown resident in the King's dominions and over aliens temporarily resident therein while Paramountcy as a prerogative extends only over the Indian States. Paramountcy is no doubt a distinct part of the prerogative of the Crown. Nonetheless, the fact remains that Paramountcy is a prerogative of the Crown.

(2) Being the prerogative of the King, the exercise of Paramountcy is subject to that part of the Municipal Law which is called the law of the Constitution

(3) According to the principle of the Constitutional Law, while the prerogative vests in the King, the King has no discretion in the exercise of his prerogative but can exercise it only in accordance with the advice given to him by his Ministers. The King cannot exercise it independently of the advice of his Ministers.

The last proposition enunciated above requires further elaboration, For, it may be asked on the advice of which Ministry is the Crown to act. The answer is on the advice of the Ministry of the Dominion concerned. Before the Statute of Westminster the British Empire constituted one single Dominion. Consequently, in the matter of the exercise of its prerogative rights, the Crown acted on the advice of the British Cabinet. After the passing of the Statute of Westminster which carved out Canada, Australia, South Africa and Ireland as separate Dominions, the Crown, in the exercise of its prerogative rights acts on the advice of the Cabinet of the Dominion concerned. It is bound to do so. It cannot do otherwise. It follows that when India becomes a Dominion, the Crown will be bound to act in the exercise of its prerogative rights, *i.e.,* Paramountcy on the advice of the Indian Cabinet.

The protagonists of the theory, that Paramountcy cannot be transferred to the Government of India, rely on the omission from the Government of India Act 1935 of the provisions of section 39 of the Government of India Act of 1933 (they were reproduced in section 33 of the Government of India Acts, 1915—19) according to which the civil and military Government of India (as distinguished from the civil and military Government of British India) is vested in the Governor-General in Council and argue that the omission is evidence in support of the

conclusion that Paramountcy could not be transferred to an Indian Government. To say the least the argument is purile. The Existence or non-Existence of such a provision in the Government of India Act is quite beside the point and proves nothing. The non-existance of the clause does not prove that India can under no circumstances claim the right to advice the Crown in regard to the exercise of Paramountcy. Its existence in the Government of India Act does not mean that such a power was vested in it during 1833 to 1935 when it formed part of the Act for, that very clause contained the proviso whereby the Governor-General in Council was required to pay due obedience to all such orders as may be issued from the Secretary of State which means, even during 1833 to 1935, the ultimate authority to advice the Crown in the matter of the exercise of the prerogative was the Secretary of State for India in British India.

The different methods of disposing of Paramountcy adopted in the various Acts passed by Parliament relating to the governance of India between the 1833 to 1935 do not and cannot in any way affect the claim of the Indian people to advise the Crown in the exercise of Paramountcy. Under the Constitutional Law of the Empire only when a country has become a dominion, that it can claim the right to advise the Crown and the fact that before it became a dominion the Crown was differently advised is no bar to its claim. In the 1935 Act, India was not a country with responsible Government. But even if it was, India could not have claimed to advise the Crown in regard to the exercise of its prerogative rights regarding Indian States. This is because the Constitutional Law of the British Empire makes difference between responsible Government and Dominion Status. In responsible Government, the right of the Cabinet to advise the Crown and the obligation of the Crown to accept it is confined to cases of the exercise of the prerogative arising out of the internal affairs of the country. As to external affairs the British Cabinet retained the right to advise the Crown. But in the case of a Dominion, the Crown is bound to accept the advise of the Ministry with regard to all cases of the exercise of the prerogative whether it relates to internal affairs or external affairs. That is

why a dominion can make a treaty with a foreign country without the intervention of the British Cabinet. The fact that the Government of India was not permitted to advise the Crown in the exercise of its rights of Paramountcy does not mean that there is any inherent Constitutional incapacity which disentitles her from claiming the right to advise. The moment India gets the Status of a Dominion it automatically acquires the capacity to advise the Crown on Paramountcy. What has been stated above is no more than a summary of the Constitutional Law of the British Empire and the process of its evolution showing how a part of the Empire which acquires the Status of a Dominion becomes vested with the exclusive right to advise the Crown in the exercise of its prerogative. Why should this right be denied to India when she becomes a Dominion it is difficult to understand. On parity of reasoning, India should get the right to advise the Crown in the exercise of its prerogative as did Canada, Australia, South Africa and Ireland. That Prof. Holdsworth came to a different conclusion is due not to any difference in the fundamental propositions of Constitutional Law stated above. Indeed he accepts them in toto. The reason why he came to a different conclusion is because he posed quite a different question for argument. The question posed by Prof. Holdsworth was whether the Crown could cede or transfer Paramountcy to an Indian Government. This is not the real issue. The real issue is whether the Indian Dominion can claim the advise to the Crown in the exercise of Paramountcy. In other words, we are not concerned with the question whether Paramountcy could be transferred. The issue with which we are concerned is how Paramountcy can be exercised. I am sure that if Prof. Holdsworth had realised what the real issue was, he could not have come to a different conclusion.

So far I have dealt with one part of the Cabinet Mission's statement where they say that the Crown could not transfer Paramountcy to an Indian Government. There remains for consideration the other parts of their statement in which they say that the Crown will not transfer Paramountcy to an Indian Government. According to the Cabinet Mission, Paramountcy will lapse. This is a most astounding statement and runs

contrary to another well-established principle of the Constitutional Law. According to this principle, the King cannot surrender or abandon his prerogative rights. If the Crown cannot transfer Paramountcy the Crown cannot also abandon it. The validity of this principle was admitted by the Privy Council in The Queen *vs.* Eduljee Byramjee decided in 1840 and reported in 5 Moore's P.C. p. 276 wherein they said (p. 294) that the Crown could not even by charter part with its prerogative. It is, therefore, obvious that the statement made by the Cabinet Mission that the Crown will not exercise Paramountcy is contrary to the Constitutional Law by which the Empire is governed. The Crown must continue to exercise Paramountcy. It is of course true that the Crown can surrender its prerogative if permitted to do so by express statutory authority. The question is whether it would be legal and proper for the British Parliament to make a Law permitting the abandoning of Paramountcy. It would be open, I am sure, for Indians to argue that such a step by the British Parliament would neither be proper nor legal. It would not be legal for the simple reason that after India becomes Dominion, the Statute abrogating Paramountcy can be passed by the Dominion Parliament of India and the British Parliament would have no jurisdiction in this matter at all. Again a Statute passed by the Parliament of the Great Britain abrogating Paramountcy would be improper. The reason is obvious. The army is the ultimate sanction for Paramountcy. This army has been the Indian Army for which British India has paid all along. Without the powerful army maintained by British India which was placed at the disposal of the Crown through his agent the Viceroy and Governor-General of India, the Crown would never have been able to build up and conserve the powers of Paramountcy. These powers are of the nature of a Trust held by the Crown for the benefit of the people of India and it would be a gross breach of trust on the part of the British Parliament to pass a statute destroying this trust. Paramountcy is an advantage which is secured to it by treaty with the Princes. Independent India can, therefore, make valid claim for the inheritance of Paramountcy.

A question may be asked : What happens when India become Independent. The Crown disappears and the question of advising

the Crown does not remain. Can Independent India claim to inherit the prerogative rights of the Crown ? The answer is yes. She can. Independent India will be a succession State. For an answer to this question one must look to the provisions of International Law relating to succession among States. Oppenheim admits that a succeeding State can inherit certain rights of the preceding State. From Hall's International Law, it would appear that among other things, property and advantages secured to it by treaty can be inherited by a succession State. India as a succession State she can inherit certain rights. On this point the following extracts from Hall's International Law are relevant :

> "And as the old State continues its life uninterruptedly, it possesses everything belonging to it as a person, which it has not expressly lost; so that property and advantages secured to it by treaty, which are enjoyed by it as a personal whole, or by its subjects in virtue of their being members of that whole, continue to belong to it. On the other hand, rights possessed in respect of the lost territory, including rights under treaties relating to cessions of territory and demarcations of boundary, obligations contracted with reference to it alone, and property which is within it, and has, therefore, a local character, or which, though not within it, belongs to state institutions localised there, transfer themselves to the new state person."

The conclusion is that the Indian States will continue to be in the same position when India becomes Independent as they are now. They will be sovereign States to the extent they are, but they cannot be independent States so long as they remain under the suzerainty, as they must be, either of the Crown, if India remains a Dominion and under the suzerainty of the succession State, if India becomes independent. While the suzerainty remains they can never be independent. The States may declare themselves independent. But they must realise that while the suzerainty lasts and it must continue even when India becomes independent, India will not recognize their independence nor can a foreign State accord them the status of an independent State. The only way by which the Indian States can be free themselves from Paramountcy would be to bring about a merger of sovereignty and suzerainty. That can happen only when the States join the Indian Union as constituent units thereof. The States' spokesmen ought to know this. But as they seem to have

forgotten it is necessary to remind them of what happened at the R T C. In the beginning, the States were not prepared to join the Federation. They agreed to join the Federation when they came to know that the Butler Committee had laid down the doctrine that Paramountcy was Paramount. This change of attitude was due to the realization that to the extent the powers comprised in Paramountcy were handed over to the Federation to that extent Paramountcy would vanish. In fact, as most of us know, the Princes did raise the question to the then Secretary of State and asked him that the scope of Paramountcy should be limited to, by excluding the subjects included in List No. I. The then Secretary of State had no answer to give and silenced the Princes by frowning upon them. Apart from the attitude of the then Secretary of State, the point remains that the Princes had seen the point that the dissolution of Paramountcy lay in joining the Federation. That point remains as valid now as it was then. It would be wise on the part of the Indian States to follow that line and not to pursue the mirage of independence. The people of India should, therefore, repudiate the proposition enunciated by the Cabinet Mission that Paramountcy will lapse. They should insist that Paramountcy cannot lapse and that they are the heirs to that Paramountcy and will continue to exercise it, *vis-a-vis* such Indian States as do not join the Union even after the British have left. The States, on the other hand, should realize that their existence as Sovereign Indian States will not be worth 5 years purchase. It is in the interest of the Princes that they should join the Union and become Constitutional monarchs. Any Dewan who advises his Prince not to join the Union is really acting as the enemy of the Prince. The joining of the Federation will no doubt involve the introduction of responsible Government but it has this advantage, viz., that the Union will guarantee to the Princes the rights relating to dynastic succession which is the most that a Prince can expect. To be independent and to hope to get recognition and protection from the UNO is to live in one's own paradise. It is doubtful if the UNO will give recognition to Indian States ignoring the claim by India of suzerainty over them. But even if that happens, the UNO will never grant any assistance to an Indian State from external aggression or internal commotion without insisting that the State should first introduce responsible

Government within its area. All these things are writ large on the wall. He who runs may read it. Those who refuse to read it will no doubt share the fate which befalls all those who are blinded by their self-interest

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PART IV

NOTES ON ACTS AND LAWS

1. The Common Law.
2. The Dominion Status.
3. The Law of Specific Relief.
4. The Law of Trust.
5. The Law of Limitation.
6. The Law of Criminal Procedure.
7. The Transfer of Property Act.
8. The Law of Evidence.

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1. COMMON LAW

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COMMON LAW

The Relation of Common Law to Equity

1. In the English system, Equity has acquired a technical connotation and we are accustomed to think of it as a whole jurisdiction distinct from Common Law principles.

2. For better or for worse, the stream of English Law divided into two channels, not without considerable disturbance of the soil and morbidity of the waters.

3. But the interdependence of Law and Equity has never wholly disappeared.

4. We ought not to think of Common Law and Equity as rival systems. Equity was not a self-contained system, at every point it presupposed the existance of Common Law.

The principle on which the Court of Equity granted relief

1. If we look for one general principle which more than any other influenced the Equity developed by the Chancery, we find it in a philosophical and theological conception of *conscience.*

2. The English Equity begins to be systematized under the guidance of a governing moral principle of conscience.

3. Not that we can suppose that all the Chancellors were assidious and consistent in the pursuit of that principle. Under the Tudors, some Of them behaved with complete arbitrariness. These occasional aberrations may have inspired Seldon's oft quoted, but probably only half serious quip about the length of the Chancellor's foot. But they were not typical, the 'conscience' which the Chancellor set before him was normally something more constant and imperishable than the mere caprice of his own whim. A 'hardening' process sets in. By 1676 we find Lord Nottingham expressly repudiating the notion that the conscience of the Chancellor is merely *naturalis et interna,* and in 1818, Lord Seldon summarily repudiates any notion of mere

individual discretion being open to an Equity Judge. Equity is a settled system of conscience.

The limits of the Chancellor's authority

1. This prerogative to grant relief had certain limits :—

(i) It could be exercised only where law gave no rights but where conscience required that certain rights should be given—This was known as the *Exclusive* jurisdiction of Equity.

(ii) It could be exercised only where law gave rights required by conscience but the remedies which it gave were insufficient to satisfy justice—This was known as the *concurrent* jurisdiction of Equity.

(iii) It could be exercised in matters in which the law gave rights required by conscience and remedies sufficient to satisfy the ends of justice but as to which its process was too defective to secure the remedies without the assistance of Equity—This was known as the *auxiliary* jurisdiction of Equity.

The nature of an equitable right

1. The nature of an equitable right will be better understood if it was studied in contrast with a moral right and a legal right. A mere definition would be very little use.

2. By way of introduction we may begin by seeking to have a precise conception of a right. What do we mean when we say that any given individual has a right :

(i) If a man by his own force or persuasion can carry out his wishes, either by his own accord or by influencing the acts of others, he has the 'might' so to carry out his wishes.

(ii) If, irrespectively of having or not having this night, public opinion would view with approval or at least with acquiescence, his so carrying out his wishes, and with disapproval any resistence made to his so doing then he has a '*moral right*' so to carry out his wishes.

(iii) If, irrespectively of the approval or disapproval, acquiescence or non-acquiescence of public opinion, the State would support him in carrying out his wishes then he has a *legal right* so to carry out his wishes.

3. Whether it is a question of might, depends upon a man's own powers of force or persuation. Whether it is a question of moral right depends on the readiness of public opinion to express itself on his side. Whether it is a question of legal right, depends upon the readiness of the State to exert its force on his

behalf. A *legal right* exists where one course of action is enforced, and the other prohibited by that organized society which is called the State. A legal right is, therefore, an interest which is recognized and protected by the State. Right is any interest, respect for which is a duty and the disregard for which is a wrong.

The Characteristics of a legal right

1. A legal right is a right which unlike moral right is enforced by the State.

2. A legal right is founded in a title which must be shown to have been acquired in any one of the modes of acquiring title recognized by law—*e.g.* possession, prescription, agreement and inheritance, etc.

3. A vestitive fact which creates a title to a right in one person destroys the title of another to the same right.

4. A legal right creates an obligation which is either an obligation *in rem* or an obligation *in personam*.

In what respects does an equitable right resemble, in what respects does it differ, from a legal right

1. Equitable right is not like a moral right which is not enforced by the State. Equitable right is like a legal right in that it is enforced by the State.

2. A title to an Equitable right need not be created by any one of the recognized modes by which a title to a legal right is created. This is the most important distinction.

Illustration :

(i) A legal mortgage of land must be created by a deed. But an equitable mortgage may be created otherwise than by deed :—

(a) The statute of trade required that no action shall be brought upon any contract or sale of lands or any interest therein unless agreement was in writing and signed by the party or his agent.

But if the title-deeds of an estate are, without even verbal communication, deposited by a debtor in the hands of the creditor, the mere fact of such deposit is enough to constitute the creditor a mortgage of the estate.

(b) An agreement that a creditor shall hold land at a fair rent to be retained in satisfaction of the debt, is a mortgage in equity but not in law.

(ii) **Assignment**—Legal and Equitable.

Legal.: (1) Assignment must be in writing under the hand of the assignor—signature of the agent not sufficient.

(2) The writing must contain a direction or order to the debtor by the creditor to pay the assignee.

(3) There must be express notice of assignment to the debtor.

Equitable: (1) The mode or form of assignment is immaterial provided the intention of the parties is clear. Assignment may be verbal.

(iii) **Charge**—Legal and Equitable,

(iv) **Lease**—Equitable and Legal,

(v) **Servitude**—Equitable and Legal.

Married Women's Property

This illustrates how an equitable right can arise without the legal formalities of conveyance required for the creation of a legal right.

(1) At Common Law, husband and wife were one person, and the status of the wife merged in that of the husband. The result of this merger was that the husband became the absolute owner of her personal property and acquired the sole right of controlling and managing her real estate.

On her death he became absolutely entitled to any of her personal property that had not already been sold and to a life estate by *courtsey* in her fee provided a child had been born.

(2) Secondly, a husband could not make a grant to his wife directly or enter into a covenant with her, for to allow either of these things would have been to suppose her separate existence.

(3) The effect of marriage at Common Law was to make a man complete master of his wife's property and to deprive her of contractual capacity.

(4) If property was given to a married woman by words which indicated either expressly or by implication that she was to enjoy it *"for her sole and separate use"*. Equity removed that property from the control of the husband by regarding him as a trustee, and conferred upon the wife full powers of enjoyment and disposition.

But equity went even further than this. Perceiving the danger that a husband might persuade his wife to sell her separate property and hand the proceeds to him, it permitted the insertion in marriage settlements of what is known as *"restraint upon anticipation"*. The effect of such restraint, which is still usual, was that a woman while possessing full enjoyment of the income was prevented during her coverture from alienating or charging the corpus of the property. She could devise but could not sell or mortgage it. This was in complete contravention of the Common Law. At Common Law, not only marriage became a vestitive fact giving the husband a title to the property of his wife but no agreement either with the wife or any other person could take away his right to hold and to alienate her property.

This is an illustration which shows that an Equitable right arises in a manner very different from that in which a legal right arises.

(3) Second distinction between a legal right and an equitable right may be formulated thus :

1. A legal right vested in one owner destroys either partially or completely the right vested in its previous owner. The destruction may be complete or may be partial. If it is a lease, it is a partial destruction. If it is a sale, it is a complete destruction. But whether complete or partial, it is destruction. This is what is meant when it is said that a *vestitive fact* is also *divestive* fact.

2. This is not true when there is a competition between a legal right and an equitable right. An equitable right does not destroy a legal right even when it prevails as against the owner of a legal right. In a conflict between a legal and an equitable right, the equitable right does not destroy the legal right, as one legal right does another legal right.

3. *Why is this so* ? For this it is necessary to know how an equitable right came to be recognized at the very start by the Court of Chancery. The historical setting may be presented briefly as follows :—

(i) It was a common practice in England before the Norman conquest for one person to do something *ad opus*—on behalf of another. For instance the Sheriff seized lands and held them *ad opus domini Regis* or where a knight went about to go to the crusades, conveyed his property to a friend to hold it on behalf of his wife and children. The word *opus* became gradually transformed into *use* and the land transferred came to be spoken of as land put in use.

(ii) Now if in certain circumstances some persons could deal with land on behalf of or to the use of another, the question that inevitably occured to men, why one person should not in a general way be allowed to hold land to the use of another. This as a matter of fact was exactly what was done in course of time. The tenant *A* would transfer his land by a Common Law conveyance to *B,* who undertook to hold it on behalf of, or adopting the correct expression, to the use of A.

In such cases *B* was called the *feoffee to use,* that is, the person to whom the feoffment had on certain conditions been made, while *A* went by the name of the *Astin que use.* which being interpreted, meant the person on whose behalf the land was held.

(iii) Reasons why this practice grew, are many. There were altogether six reasons why people liked to follow this practice of putting land in use. Of these two are of importance :—

(1) It enabled a party to escape the fuedual burdens to which was liable at Common Law. At Common Law the following burdens were placed upon the tenant—

(i) *Relief*—paid by a new tenant upon the death of an old tenant,

(ii) Aids—payable in three cases—

(a) to ransom the Lord when imprisoned;

(b) when the Lord desired to make his Lord a knight;

(c) when the Lord was obliged to supply his eldest daughter with a dowry.

(iii) Escheat—The commission by a tenant of a crime serious enough to amount to felony caused the land to escheat.

(iv) *Wardship.*—If an existing tenant died leaving as his heir a male under 21 or a female under 14, the Lord was entitled to the wardship of the heir and as a consequence was free to make any use he liked of the lands during the minority without any liability to render accounts.

(v) *Marriage :*—To find a suitable match for an infant ward was the right of the Lord, and if the infant ward refused, the Lord was entitled to compensation.

The feoffor became free by putting his land in use. The burden fell on the person who acquired *Scisin,* namely, the feofee to uses.

(2) The second advantage was avoidance of forfeiture and escheat.

Land held by tenure at Common Law was forfeited to the Crown if the tenant committed high treason, and upon his conviction or on slavery for felony, it escheated to the Lord. These unpleasant consequences were avoided, if a tenant, before embarking upon some doubtful enterprise, had the prescience to vest his lands in a few confidential friends. The deliquent might possibly suffer the extreme penalty, but at least his family would not be destitute.

4. Legal effect of putting lands in use :—

(i) The legal consequence of this practice of putting lands in use is an important point to note. It was to cut off the *cestui que use* in the eyes of the Common Law from all connection with the land. By a conveyance operative at Common Law, he had conveyed his estate to the *feofee to uses* and was, therefore, deprived of all Common Law rights over the land. He was nothing, the feofee was every thing. Instead of keeping scisin, he chooses to rely upon the confidence which he reposed in the feofee.

(ii) If the feofee failed or refused to carry out the directions imposed upon him or if he deliberately alienated the land for his own purposes, there was no Common Law action by which he could be rendered liable.

(iii) If a *cestui que use* was let into possession of the land by the feofee to uses, he was regarded as a mere tenant at will of the *feofee to uses* and could be turned out any moment, and in the event of contumacy could be sued in trespass by the feoffee.

5. The nature of the remedy provided by the Court of Chaucery to protect the feofor must be clearly understood :—

(i) The Chancellor could not interfere with the jurisdiction of the Common Law Courts by proceeding directly against the land itself because the absolute title to the land was vested in the feofee by the conveyance. The Chancelllor could not disregard the fact that a feoffee was absolute owner at Common Law by virtue of the Common Law conveyance called feoffment whereby the land had been transferred to him.

(ii) The Chancellor distinctly recognized the fact that the feoffee was the owner of the land and had a legal right but what he said to the feoffee was this :—

> "You have the legal right, I do not take it away from you but I will not permit you to exercise that legal right in such a way as to infringe the understanding on which the feoffor made the feoffment."

(iii) The Chancery in assuming jurisdiction over the *use* left untouched and inviolate the legal right of owner at Common Law. It exercised no direct control over the land. It only regulated the mode and manner of the legal right by imposing upon the owner of the legal right an obligation to observe the condition. The legal owner retained his legal right to own and to possess the land. The Chancellor gave the feoffor an equitable right to demand observance of the conditions of feoffment.

6. This is the explanation of that difference between a legal right and an equitable right according to which while one legal right destroys another legal, either partially or wholly, an equitable right does not destroy a legal right.

7. This is also the explanation of the proposition enunciated by Strahan in *Article 11,* namely, that a legal right or interest issues *outflows out* of the property itself while equitable right or interest issues or flows out of the legal interest and not out of the property.

This is so because the Chancellor did not recognize the right of the equitable owner to obtain possession of property. That right he retained in the legal owner. What he gave to the equitable owner was the right to impose a duty upon the conduct of the legal owner and he did not give him the right to claim the property itself.

Illustration: (1918). *2K.B.* (Ir.) 353—Graham *vs.* Mcllwaine.

8. The consequences that follow from this fact may be noted :—

(1) Because an equitable right issues out of a legal right and not out of the property :

(i) It cannot be greater than the legal estate out of which it issues.

Illustration :

Land conveyed to *A* for the use of *B* and his heirs. *A* is the legal owner of the land. *B* is the equitable owner.

But land is conveyed to A and not to A and his heirs. Consequently the legal right of A vanishes at his death. As A's legal right vanishes so does *B's* equitable right.

An equitable interest cannot survive the legal interest out of which it flows, *(1914) i Ch. 300*

(ii) Equitable right will be affected by all the infirmities attaching to the legal right.

A died intestate leaving *B* and *C* as his sons, *B* being the eldest.

B being away C takes possession and transfers it to *D* for the use of his wife *E.*

B returns and claims the property. The legal tide of *D* comes to an end by reason of the flaw in *C's* title.

The equitable estate of *E*, the wife of *C,* also comes to an end.

III. The third difference between a Legal Right and an Equitable Right is that, a legal right may be a right in *rem* or may be a right in *personam*. But an equitable right is always a right in *personam*. Who is bound to respect the right of an Equitable owner ? Not the world but the legal owner and no one else.

It is true, the legal owner, who is bound, is not the legal owner against whom the equitable right first arose but includes also every legal owner to whom the right is transferred.

All the same the proposition stands that an Equitable Right is a right in *personam* which binds only the legal owner.

Explain,

"Equitable rights have a resemblance to rights in rem."

(i) It is true that Equitable Rights have a resemblance to rights *in rem*.

(ii) How does this resemblance arise ?

(i) An equitable right will be enforced not only against the owner of legal right but it will be enforced against :—

(a) his representatives and volunteers claiming through or under him,

(b) persons who acquire the legal right

(i) with the knowledge of the legal right,

(ii) against those who could have had knowledge.

(iii) The standard of knowledge set up by the Court of Chancery was so high that no one could escape and every purchaser was bound.

Equitable Priorities

1. An equitable right is a right *in personam*—operating against the owner of a legal right out of which it flows.

2. There may be two equitable rights flowing out of one legal right. Both would be rights in *personam* against the owner of the legal right out of which they flow.

3. An equitable right being a right in *personam* arising out of the legal and not out of the property which is the object of the legal right, could be defeated by transferring the legal right to a new owner. Or another equitable right may arise by this transfer which may defeat the prior equitable right.

4. The question to be considered is, in what cases can such a transfer defeat an equitable right ?

5. The subject is discussed generally under the heading of *Equitable Priorities*. It is so designated because the test applied for the determination of the issue is the priority in time. But the real subject matter is the possible cases where an equitable right can be defeated by transfer of a legal right out of which it arises or by the creation of another equitable right out of the same legal right ?

6. Cases to be considered fall under two classes :

(i) Cases where there is a conflict between Legal Right and an Equitable Right

(ii) Cases where there is a conflict between two equitable rights.

7. Under the first class of cases there are two contingencies which must be distinguished :

(a) Where the Equitable Right is prior in existence to the legal right.

(b) Where an equitable right arises subsequently to the legal right.

Mrs. Thorndike was the beneficiary of a certain Trust Fund of which *C* was a trustee. In a suit by Mrs. Thorndike, the Court directed the Trustee to transfer of the fund into the Court for the purposes of the Thorndyke Trust and was held by the Administrator. It appeared that the Trustees against whom the order was made had provided themselves improperly with the means of discharging themselves from their personal liability to bring the fund into Court and that there are third persons whom

they had injured. The third party so injured filed a suit praying that the fund held in the name of Thorndyke should be transferred to them. *Contention* : Legal title not in Mrs. Thorndyke and therefore, her right could not prevail. Contention disallowed. Held, not necessary to acquire legal title personally. Also no notice.

8. Altogether we shall have three questions to consider which may be formulated thus :

(i) Whether a person who acquires a legal right will be subject to a prior equitable right ?

(ii) Whether a person who has acquired a legal right will be postponed to an equitable right arising subsequently.

(iii) Where neither party has a legal right and both have only equitable rights, which of them will have priority ?

(i) Whether a person who has acquired a legal right will be subject to a prior equitable right ?

1. The answer to this question is this :

A purchaser obtaining a legal estate for valuable consideration and without notice of a prior equitable right will not be bound by the equitable right.

2. There are three important elements in this proposition :

(1) *Purchaser must have acquired a legal Estate.*—There is not much to be said about this. But the following points may be noted :

(a) It is not necessary that he should acquire the legal estate personally. It is enough if somebody does it on his behalf.

Thorndike vs. Hunt, (1859) 3 De. G.I.563=44E.R. 1386

(b) The purchaser's title need not be a *perfect title.*

Illus.: If a trustee's title to property is defective, he may never the less convey to a *bona fide* purchaser an interest which will be effective against the beneficiary who is the owner of a prior equitable right.

Jones vs. Powles (1834) 3My & K. 581.

Facts

1. *John Jones* Owner—Mortgaged his house to Holbrook, redeemed it, obtained acknowledgement of payment—but did not

obtain reconveyance. The legal estate remained outstanding in Holbrook.

2. On the death of Jones Meredith, his shop assistant forged a will of Jones and on its vests obtained possession of the house.

3. Meredith mortgaged it to Hall by a conveyance.

4. Meredith died leaving his wife to whom he left the equity of redemption by a will and thereafter to James Jones.

5. James Jones conveyed it to Watkins.

6. James Jones & Watkins became partners and mortgaged the property to *Powles* who acquired possession as mortgagee.

7. Powles died leaving his wife *Sarah.*

8. Sara Powles secured surrender of the estate and full ownership.

9. Sara Jones sued Sara Powles alleging that the will was a forgery and that Sara Powles had notice and that she could not defeat her right to redeem.

(c) The purchaser should obtain a legal right. But this may be:

(i) at the time of his purchase, or

(ii) he may get it subsequently.

(ii) The purchaser must have given valuable consideration for his right.

A volunteer is always subject to an equitable right. The reason is that he does not suffer by being made liable to the prior equitable right not having paid any consideration.

An existing debt is, however, sufficient consideration.

Illus. Thorndike vs. *Hunt.*

I had paid no consideration. His right was a sort of an existing debt against the trustee.

(iii) The purchaser must have acquired the right without notice of the existence of the prior equitable right.

This is the most (important)* element in the proposition and the question that arises for consideration is : (further portion not found—ed.)

* Inserted—ed

What is Notice ?

1. Notice may be *Direct or Imputed*. Direct notice is notice to the purchaser himself. Imputed notice is notice to the agent of the purchaser.

2. Direct Notice may be *actual* or *constructive*

(1) Actual notice is where the matter is *within* the knowledge of the purchaser or his agent.

(2) Constructive notice (is)* where it would have come to his own knowledge or to the knowledge of his agent if proper inquiries had been made.

Actual Notice

1. If reliance is placed upon actual notice to defeat a legal right it must be proved that :

(i) It was given by a person interested in the property;

(ii) it was given in the course of negotiations;

(iii) it was clear and distinct.

Constructive Notice

1. Constructive Notice arises where there is notice of a fact or facts from which notice of the existence of an equitable right could be presumed. It is not notice but evidence of notice.

2. There are three varieties of constructive notice :

(i) Where there is actual notice of a fact which would have led to the notice of the existence of the right. *Bisco vs. Earl of Banbury* (1676) (6) *1 Ch. Ca. 287.*

The purchaser had actual notice of a specfic mortgage but did not inspect the motgage-deed which referred to other rights and incumbrances.

He was held to be bound by other incumbrances for he would have discovered their existence if he had inspected the deed as any prudent man would have done *Davis vs. Hutchings. 1907 1 Ch. 356.*.

A trustee transferred a share of the beneficiary to the Solicitor relying upon the statement made by him that it was assigned. They did not call for the assignment. The assignment was subject to a charge in favour of another. *Held* they had constructive notice of the charge.

* Inserted—ed.

Occupation of tenant as Constructive Notice

Where land is in the occupation of some one other than the vendor, the fact of the occupation gives the purchaser constructive notice of any right of the occupying tenant.

It will not amount to notice of a third person's right—9. Moo. *P. C.* 18.

We now come to the parol evidence of notice. Upon this subject the rule is settled, that a purchaser is not bound to attend to vague rumours about purchaser—to statements by mere strangers, but that a notice in order to be binding must proceed from some person interested in the property—

R. 3 Ch. App. 488 *Lloyd* vs. *Banks* Carries j—1868

If he attempts to prove knowledge of the trustee *Aliunde,* the difficulty which this Court always feel in attending to what are called casual conversations or in attending to any kind of intimation which will put the trustee in a less favourable position as regards his mode of action than he would have been in if he had got a distinct and clear notice from the incumbrances. At the same time I am bound to say that I do not think it would be consistent with the principles upon which this Court has always proceeded, or with the authorities which have been referred to, if I were to hold that under no circumstances could a trustee without express notice from the incumbrancer be fixed with knowledge of the incumbrance. —*Illus.: 9 Moo. P. C. 18 Barnhart vs. Greenshields.*

Where it was held that vague reports from persons not interested in the property will not affect the purchaser's conscience.

Should notice be directly from the Incumbrancer ?

A purchaser cannot safely disregard information, from whatever source it may come. It is of such a nature that a reasonable man of business would act upon that information even if it came from a news-paper report. *S. R. 3 Ch. App. 488* 1868

Registration

The registration of any instrument or matter required or authorized to be registered by law is to be deemed to constitute

actual notice of such *instrument* or *matter* but not necessarily of its contents.

(ii) Where inquiry is purposly avoided to escape being bound by notice.

1. John Towsey contracted for the purchase of certain property in 1776.

2. He borrowed the amount of purchase money from one Dr. P, and placed the title-deeds in his hands as a security for repayment.

3. In 1790, T was very much indebted to one Ellames in a considerable sum of money and executed a mortgage of the same property to Ellames.

4. Dr. P did not give any information of his claim to Ellames.

5. Ellames said that he made no inquiries after the title-deeds before he took the security, and admitted that upon executing the mortgage he inquired for them, and was informed of their being in the hands of Dr. P. but that he understood them to be so for safe custody only.

6. He received this information from one J. who was his brother-in-law, who had prepared the mortgage and appeared as his agent at the time of the execution of it.

7. Dr. P claimed priority over Ellames. It was granted as Ellames was held to have had notice.

(iii) Where there is gross negligence in not making usual and proper inquiries :

1899. 2 Ch. 264
1921. 1 Ch. 98.

Imputed Notice

1. The underlying theory of agency is that a man can do a thing by an agent which he can do himself. Conversely, what is done by the agent is done by him. This being so, it is open to argument that what is known to the agent must be taken to be known

to the Principal. This is the theory on which the doctrine of imputed notice is founded.

The Essentials of Imputed Notice

1. *The knowledge must have come to him as an agent* and not in any other capacity. In other words, agency must be strictly proved.

Dyllie vs. Pollen—32 L. J. Ch. 782 (N. S.)

2. Agent must be distinguished from a person employed to do merely ministerial act—*e.g.* a person employed to procure a deed is an agent.

Knowledge to such a person cannot be the basis of imputed notice.

3. In this connection, the position (of)* a person who is in the service of two Principals as their agent has to be considered. Suppose, there are two companies, *A* and *B,* and C is an officer employed in both A & B. Suppose that A company transferred their legal right to B company which was subject to an equitable right in favour of D of which C had knowledge.

Can D say that B company had notice of his equitable right because C, their agent, had notice of it in his capacity as the agent of A?

The answer is that, his knowledge which had acquired as agent of A company, will not be imputed to B company unless he owes a duty to the A company to communicate his knowledge and also a duty to the B company to receive the notice.

(1896) 2 Ch. 743—*In Re Hampshire Land Company.*

Facts :

1. Hampshire Land Company was registered under the Companies Act, 1870.

2. The Company was closely interconnected with the Port Sea Island Building Society. Four Directors and a Secretary by name Wills were common to both.

Inserted—ed.

3. On the 19th February 1881, a general meeting of the Company was held at which a resolution was passed authorizing the Directors to borrow 30,000 £.

4. The Directors borrowed this amount from the Port Sea Society.

5. The Society went into liquidation in 1892. The Liquidator of the Society sought to claim the sum of £ 30,000 lent to the company.

6. It was contended that the resolution of the company authorizing borrowing was *ultra vires* and that because William, the Secretary was a common officer notice to him was notice to Society and therefore Society could not recover.

7. *Held* that the Society could *recover* for reasons at p. 749.

II. The notice to the agent must have been obtained by him *in the same* transaction and not *in a previous* transaction.

There is a further qualification. Even if the notice was acquired by the agent in the *same* transaction, it will not be imputed to the purchaser, unless it is *so* material to the transaction as to make it the duty of the agent to communicate it to the principal.

(*1886*)—*31 Ch. D. 671—In Re Cousins.*

Facts :

1. In 1871, one William's cousins made a will of his property and left it in trust to his trustees.

2. One William Banks was a solicitor for the trustees.

3. Mathew, a cousin was to receive a share in the proceeds of real and personal property left by William's cousins under the will.

4. Mathew mortgaged his share to William Banks, the Solicitor as security for a loan of £ 35.

5. In 1873, Mathew mortgaged his share to William Richardson through Banks and Banks was paid off.

6. In 1874 Richardson transferred his mortgage to William Drake. No Notice was given to the Trustees.

7. In 1875 Mathew mortgaged his share to Dennis Pepper to secure a payment of £ 500. Banks acted as the Solicitor. The mortgage to Dennis Pepper did not mention the previous mortgage to William Drake, Subsequently a notice of this transaction was given to the Trustee.

8. Drake took out a summons for payment of his mortgage debt due from Mathew out of the funds in the hands of the Trustee in *priority* to Pepper's claim. *1884, 26 Ch. D. 482*

9. Pepper's contention was that, he had no notice of Drake's claim—Mathew not having mentioned it in his deed of mortgage.

10. It was replied by Drake that Pepper had notice because Banks, the Solicitor who acted as his agent knew of Mathews mortgage to Drake.

11. That Banks had notice, it was not denied. That Banks was the agent of Pepper was not denied. But the question was whether notice to Banks can be held to be notice to Pepper.

12. *Held*: No—p. 677.

Reasons. The knowledge of Banks did not arise in the course of the transaction with Pepper in 1875. Pepper could not be said to have any notice.

13. Pepper's claim was allowed.

III. Notice to agent will not be imputed to the purchaser when the agent is shown to have intended a fraud on the principal which would require the suppression of his knowledge and not communicate it to the Principal.

(1880) 15 Ch. D. 639 Cane vs. Cave.
(1428) ACI—Houghton & Co vs. Nothard)

II. *Where an equitable right has come into being subsequently to the acquisition of a legal right.*

1. Leading case on the question is *Northern countries of England Fire Insurance Co.* vs. *Whipp.*

1884 26 Ch.D.482

Facts

C, the Manager of a company, executed a legal mortgage to his company, delivered title-deeds. They were kept in a safe of the company, the key to which was in C's possession: C—some time after took out the title-deeds and created another mortgage on the same property in favour of Mrs. Whipp. Mrs. Whipp has no notice of the first mortgage to the Company. *Held* : Company entitled to priority.

2. The proposition laid down in the case is this—

> Where the owner of a legal estate has assisted in or connived at the fraud which has laid to the creation of a subsequent equitable estate and the owner of equitable estate had no notice of the prior legal right, the Court will postpone the legal estate to the equitable estate although it is subsequent in its origin.

3. What is the evidence of assistance in or connivance at fraud :

> (i) Omission to use ordinary care in inquiry after title-deeds.
>
> (ii) Failing to take delivery in title-deeds are treated as evidence of assistance in or connivance at fraud where such conduct cannot otherwise be explained.

4. The same authority lays down another case in which also a legal estate will be postponed to a subsequent equitable estate.

Where the mortgagee, the owner of the legal estate has constituted the mortgagor, his agent with authority to raise money on the property mortgaged and the estate created has by the fraud or misconduct of the agent been represented as being the first estate.

5. For the operation of this rule, mere carelessness or want of prudence on the part of the legal owner will not be a sufficient ground. There must be fraud and connivance at or assistance therein. Nothing but fraud I will postpone.

(*1913*) *2 Ch. 18.*

III. Where the competition is between two equitable rights.

1. In the two former cases the competition was between a legal right and an equitable right. In the third case the competition is between two equitable rights.

Cave vs. Cave, (1880) 15 Ch. D. 639.

Facts :

A Trustee & *B* a beneficiary.

A purchased land from trust-monies in breach of trust and executed a legal mortgage thereof to *C*.

C had no notice of the trust.

Later by an equitable mortgage transferred the same land to There are three persons who have acquired rights. *C*, who has a legal right, is mortgagee, being a legal mortgage.

B has an equitable right flowing out of *A*'s right which has been transferred.

D has an equitable right flowing out of A's right.

What is the position of the parties ?

1. As between C and *B,* although B's Equitable right is prior to C's legal right as C had no notice, C takes priority.

2. As between C and *D*, C takes priority, because C is not party to a fraud in creating the rights of D.

3. As between *B* and *D,* their rights are equitable rights: whose right prevails ? B's right. The rule is that where there is a competition between two equitable rights, the right earlier in origin prevails over the subsequent right.

4. This rule applies only where the equitable rights have equal equities on their side. If the equities are unequal, the better of the two prevails.

Rice vs. Rice. 2. Drewry, 73 (76-78).

A sells land to *B* and without receiving purchase money (1) conveys land to B, (2) signs a receipt for moneys and (3) delivers title-deeds to B. *B* subsequently mortgages the property to *C* who has no notice of *A's* claim. Between *A* and

C although *A's* equitable right is earlier than that of C, yet the equities are unequal. *A* is guilty of negligence, therefore, *C's* Equity is better and will prevail although later in time.

5. In some cases conflict as to priority between two equitable interests by the respective times at which the interest was transferred. In other cases, it is determined by the respective times at which written notice is given to the proper person or persons of the interest transferred (e.g. in the case of the assignment of chose in action).

Sum up. Three maxims of Equity.

1. Where equities are equal, the law prevails.
2. Where equities are equal, the first in time prevails.
3. Where equities are unequal, the better equity prevails.

Explanation

1. The first proposition has reference to cases where there is conflict between an equitable right and a legal right and applies to both classes of cases : (1) where the equitable right is prior to the legal right as well as to cases (2) where the equitable right is subsequent to the legal right.

2. Law prevails means that legal right prevails over an equitable right where no inequity can be attributed to the owner of a legal right. — Such as notice or fraud.

3. Propositions two & three have reference to cases where there is a conflict between two *equitable rights*.

Equitable Assignment

I. General

1. Although the subject is called Equitable Assignment, it is an abreviation. The subject is equitable assignment of a chose in action.

2. There are three matters of a preliminary character which must be dealt with at the outset :

(1) What is an assignment

(2) What is a chose in action.

(3) Necessity for the study of the subject.

(1) What is an assignment

1. Under the English Law of Property, property is classified as *Realty* and *Personality*.

2. In connection with the transfer of rights over Realty, the word used is *Conveyance*. In connection with the transfer of rights over Personality, the word used is either *Transfer* or *Assignment*.

3. Assignment, therefore, means the transfer by a person of his rights over personal property and particularly one form of it, namely, *chose in action*.

(2) What is a chose in action

1. Under the English Nomenclature, Personality is divisible into two classes :

(i) Moveable goods of which one can take physical possession.

(ii) Personal rights of property which can only be claimed or enforced by action and not by taking physical possession.

2. The former are called :

(i) Choses in Possession—Things in Possession,

(ii) Choses in Action—Things in Action.

3. The definition of a chose in action—

(*1902*) *2 K. B. 427* (*430*)—*Channell J.*

It is really speaking a debt.

4. The word assignment is used in respect of chose in action. It is something which you can only sign it away if you want to transfer it. You cannot deliver possession of it.

(3) Necessity of Studying Equitable Assignment

1. An assignment is a transfer of a right by its owner, subsisting against another, to a third person to whom the person against whom it was subsisting, becomes bound.

Illustration. A is creditor. *B* is debtor. *A* assigns his right to debt against *B* to *C* : *B* becomes bound to *C* and *C* gets a right to recover it from *B*.

2. Three persons are involved in an assignment :

(i) The original owner,

(ii) The person bound to the original owner,

(iii) The person to whom the original owner has transferred the right.

3. The right, i.e., the chose in action may be legal or equitable such as a legacy or an interest in a trust fund.

4. Assignment of a chose in action was differently treated by Equity and by the Common Law.

Common Law and Chose in Action

1. There could be no assignment in Common Law of a Chose in action. Not only there could be no assignment of an equitable chose, there could be no assignment even of a legal chose.

2. The reason was the fear of multiplicity of suits.

3. Statute law and Special law made certain kinds of Choses of action assignable :

(i) Negotiable Instruments became assignable by the law merchant

(ii) Policies of Life Insurance and Marine Insurance were made assignable by Statute.

(iii) Section 25(6) of the Judicature Act : all legal Choses in Action have been made assignable.

Equity and Chose in Action

1. In Equity, a chose in action was always assignable. Not only an equitable Chose was assignable in Equity but a legal Chose was also assignable in Equity.

2. If the Chose was equitable, the assignee could bring his proceedings to recover it in a Court of Chancery in his own name.

3. If it was a legal Chose, the proceedings had to be taken in the name of the assignor and the way the Court of Chancery interfered, was to restrain the assignor from objecting to this use of his name on the assignee giving him a proper indemnity against costs.

4. There were, however, some Choses in action to the assignment of which equity did not give effect on the ground of public policy :

(i) assignment of pay and half pay of public officers paid out of the National Exchequer.

(ii) Assignment of alimony to a wife.

(iii) Assignment affected by maintenance of property.

Conclusion

1. There are thus two ways of making an assignment—

(i) Legal, (ii) Equitable.

2. Although the Judicature Act has laid down the form and procedure for the legal Assignment of a legal Chose, it has not abrogated the rules of Chancery relating to Equitable assignment of a legal Chose. So that if an assignment is ineffective in law by reason of some defect, it will be good if it conforms with the rules of equity. Secondly, the Judicature does not touch the assignment of an Equitable Chose in action.

Categories of cases to be considered

There are three categories of cases to be considered in connection with the assignment of a Chose in action :

(i) Legal assignment of a legal Chose in action,

(ii) Equitable assignment of a legal Chose in action,

(iii) Equitable assignment of an Equitable Chose in action.

Requisites of a legal assignment of a Legal Chose

1. Assignment must be *absolute, i.e.,* it must amount to a *complete* divesting of his right by the assignor. The debt must be certain and must be of the whole amount.

2. The assignment must be in *writing* signed by the assignor.

It need not be by deed.

It need not be for value.

3. Express notice must be given to the debtors of the assignment.

The Section does not say :

(i) By whom is notice to be given—by the assignor or assignee.

(ii) At what time notice is to be given so that it may be given, by the assignee after the death of the assignor.

Effect of Want of Notice

1. Absence of notice does not disentitle an assignee of suing on the assignment. It only imposes certain disabilities and results in certain disadvantages.

(i) The assignee cannot sue the debtor in his own name without making the original creditor a party to the action.

(ii) The assignee will be subject to equities arising between the debtor and his original creditor before the date of the assignment and will lose his right against the debtor altogether if the debtor pays the original creditor. On the other hand, if the debtor pays the original creditor after receiving notice of assignment, the assignee could still recover the debt from him.

(iii) The assignee, who fails to give notice to the debtor of his assignment, will be postponed to a subsequent assignee for value who has no notice of the previous assignment, and gives notice of his assignment to the debtor.

Requisites of an Equitable assignment of a Legal Chose in action

An Assignment which does not comply with the statutory requirements is not necessarily ineffectual, for it may operate as an Equitable Assignment.

Two things are necessary :

(1) There must be value given by the assignor.

(2) A charge created by agreement between the debtor and the creditor upon specific funds or by an order given to the creditor upon a person holding money belonging to the debtor, will amount to an assignment.

1839. *Burn vs. Carvallo*
4 Hylve & Craig's Reports. 690

Facts

F was in the habit of sending consignments of goods to *R,* who was trading in a different town and used to draw Bills of Exchange upon *R*. It was arranged by *F* with *B & Co.* that they should endorse and negotiate his Bills drawn upon *R* against

consignment and they were to credit him with the amount and he was to draw upon it and *B &* Co. was re-imburse itself by recovering the amount from *R. F* drew for certain amounts on *B &. Co.* But *R* failed to meet the Bills on maturity.

F, who was the debtor of the *B & Co.* by a letter to *B & Co.* promised that he would direct and by a subsequent letter did. direct to deliver the goods to *V* as the agent of *B & Co.*

F wrote to *R* to transfer the goods in his possession to *V*, the agent of B & Co. in the town. *R* accordingly delivered the goods to *V* on the 30th of June 1829.

On the 23rd of June 1829, *F* was adjudged insolvent for an act done on the 23rd of May 1829. His trustee in bankruptcy sued for the recovery of the value of the goods from *B &Co. B & Co.* contended that there was an equitable assignment of the value of the goods by *F. Held* the order of the debtor was a good assignment in Equity.

Rodick vs. *Gandell.*
(1851-2) 1 Degex. 763. 42. E. R. 749

Gandell was an Engineer and was indebted to a certain Bank for a large amount and the Bank was pressing for payment.

Gandell was a creditor of a Railway Co. To induce the Bank not to press for payment and also to pay other drafts outstanding against him, it was arranged that Gandell should instruct his Solicitor to recover the amount due to Gandell from the Railway Co. and pay it to the Bank. G, by a letter to the Solicitors of the Company, authorized them to receive the money due to him from the Railway Co. and requested them to pay it to the Bankers. The Solicitors by letter promised the Bankers to pay such money on receiving it.

Why—no agreement between debtor and creditor. The Solicitor recovered the amount from the Railway Co. but instead of paying it to the Bank, paid it to Gandell. Gandell became insolvent and his property was taken possession of by the official assignee. The Bank sued for a declaration that there was an equitable assignment by Gandell of his funds claimable from the Railway in favour of the Bank and collected by the Solicitor and the

Bank was therefore entitled to recover the amount from the official assignee. *Held,* this was not an equitable assignment. It was not an order given by the debtor to his creditor upon a person owning money or holding funds belonging to the debtor directing the *person* to pay such funds to the Creditor.

There must *be privity* between the *assignor* and *assignee* in order to constitute an equitable assignment. If there is no privity then there is no assignment even in equity.

Consequently, if the Principal directs his agent to collect money owing to the principal and pay it to a third person such third person is not an assignee in equity if the mandate is not communicated to him. It may be revoked by the principal.

Similarly a Power of attorney or authority to collect money and to pay it to the creditor of the party granting the power does not amount to an equitable assignment. A cheque is not an equitable assignment or appropriation of money in the drawer's Bank.

Hopkinson vs. *Forster, (1874) L. R. 19 Eq. 74.*

There can be no valid appropriation or assignment if no specific fund is specified out of which the payment is to be made.

Percival vs. *Dunn, (1885) 29 Ch. D. 128*

Whether notice is necessary in the case of an equitable assignment ?

1. An equitable assignment is complete between the assignor and assignee although no notice is given to the debtor.

2. Notice of the assignment should, however, be given to the debtor for two reasons.

(i) If there is no notice, the debtor will be free to pay to the assignor, the original creditor and will not be liable to the assignee. On the other hand, if he pays to the assignor in disregard of the notice, he will be liable to pay over again to the assignee.

Stocks vs. *Dobson (1853) 4 De. G. M & G. 11*

(ii) If there is no notice, then the assignee will not be allowed to have priority over subsequent assignee of the same chose in action by the same assignor.

This is called the rule in **Dearl vs. Hall** (1823) 1 Rsess 1=S. F. C. p. 57.

Facts :

Peter Brown died and left a Will wherby he made a trust of his personal estate and of the monies to arise from the sale of his real estate and directed his executors to invest the same and pay interest to his son Zachariah Brown during his life. The income came to about £ 93 a year.

On 19th December 1808, Brown, in consideration of £204 paid to him by William Dearle, assigned a part of his annuity of £ 37. On 26th September 1809, Brown, in consideration of £ 150, assigned another part of his annuity of £ 27 to Sherring, subject to the assignment in favour of Dearle.

Neither Dearie nor Sherring had given notice of assignment to the executor.

In 1812 Brown advertized the life interest of 93 pounds p. a. in trust funds for sale as an unincumbered fund.

Joseph Hall proposed to purchase it and through his Solicitor investigated Brown's title. He also made inquiries of the executors, who knew of no incumbrance affecting Brown's interest. Thereupon Hall purchased Brown's interest for £ 711 -3-6 and had it assigned to him.

On the 25th April 1812, Hall gave the executors written notice of the assignment to him.

On the 27th October 1812, Dearie and Sherring gave notice of their assignment to the executors.

The executors refused to pay any one of the three until their rights were decided.

Dearle and Sherring brought a Bill in chancery against Hall praying that the income of £ 93 should be applied in satisfying their's before that of Joseph Hall.

Dearle contended that the doctrine *first in time is first in law* should be applied and as he was first he should be preferred to Hall.

Held No. Hall should be preferred.

Judgement of Plumer M. R. S. & C. p. 55

The rule was based on carelessness and negligence to perfect one's claim. But the rule is now absolute and independent of conduct. The assignee who gives proper notice first will be paid first, whether the other assignee has been guilty of carelessness nor not.

Re Dallas. (1904). 2 Ch. 385.

The rule in Dearie *vs*. Hall has always applied to assignment of all equitable interests in personality.

To whom notice should be given under the rule in Dearle vs. Hall

1. It must be given to the debtor, trustee or other person whose duty it is to pay the money to the assignor.

Stephens vs. *Green, (1895) 2 Ch. 148*

2. Notice to the Solicitor will be effectual only if Solicitor was expressly or impliedly authorized to receive it.

(1880) 14 Ch. D. 406.

3. If there are several debtors or trustees, notice to one is notice to all.

4. Fresh notice to new trustees is not necessary, if notice is given to old trustees.

What should be the form of Notice

1. Formerly, notice need not be a formal notice and might have been by word of mouth.

2. But since 1925, it must be in writing.

What title is acquired by the assignee by an Equitable assignment.

1. It has always been the rule of equity that the assignee of a thing in action cannot acquire a better right than the assignor had.

2. In other words, the assignee takes it subject to all the equities affecting it in the hands of the assignor.

Roxburghe vs. *Cox, (1881) 17 Ch. D. 520.*

So that—

(1) If the Contract between the assignor and the debtor was voidable, the debtor can set up the viodable character of the contract against the assignee, even if the assignment was for valuable consideration.

(2) If the debtor had a right of set-off against the assignor, the same would be available to him against the assignee.

3. The assignee is, however, free from equities arising after notice.

A debtor cannot diminish the rights of the assignee such as they are, on the date of notice, by any act done after date of notice.

Assignment of rights to be acquired in future

1. So far, we have dealt with assignments of rights which had accrued when the assignment had taken place.

2. We must consider the assignment of rights to be acquired in future.

3. Example of such rights :

(i) The expectancy of an heir-at-law to succeed to the Estate.

(ii) The expectancy of a next of kin to succeed to personality,

(iii) Freight not yet earned,

(iv) Future Book-debts.

4. At Common Law, they were all void. A man could not assign what he had not got. In equity, they were assignable, if for valuable consideration.

5. Equity treated them not as assignments but as *contracts to assign* , and when the assignee became possessed of it, he was compelled to perform his contract.

6. When the right was acquired by the assignor, the beneficial interest passed immediately to the assignee. But the legal interest remained with the assignor. So that, if the assignor transferred it to a subsequent assignee who gave value and had no notice of the previous assignment, the title of the subsequent assignee would prevail.

Conversion

I. Necessity for the doctrine of conversion.

1. The English Law had prescribed a different mode of devolution of the *Realty* and *Personality* of the owner, if he died *intestate*. His Realty went to his *heir* and *Personality* went to his *next-of-kin*.

2. That being so, whether the property will go to the heir or to the next of kin must depend upon the state of the property on the date on which the succession opens.

3. Ordinarily there is no difficulty. The actual state in which the property will be found on the material date will determine its devolution. But suppose, circumstances are such that on the date on which the succession opens, land *is to be sold* for money *but is not sold*, or money is *to be invested* in the purchase of land *but is not so invested,* how is the devolution of the property to be determined ? If the land is to be treated as land, until it is actually sold, then it will go to the heir. On the other hand, if it is to be treated as money, because it was intended to be sold for money, then although it is land, it will go to the next-of-kin. In other words, the question was whether property was to devolve according to the actual state in which it is found to exist or according to the form in which it was intended to be converted. The answer given by equity was, that property was to devolve, not according to the actual state in which it exists, but according to the form in which it was intended to be converted.

4. This is what is called the doctrine of conversion. There would have been no necessity for the doctrine, had there been no difference in the rules of inheritance for Real and Personal Property. This difference is now abolished by Sections 33,45 and therefore, conversion has lost all its importance.

5. In India there is no such distinction in the inheritance of property—Realty to heir and Personality to next-of-kin.

II. There are four cases which give rise to conversion.

(1) By operation of the law.

(2) By operation of the order of the Court.

(3) By operation of a Contract.

(4) By operation of a direction in a deed or a will.

(1) Conversion by operation of the Law

1. There is only one case in which conversion takes place by operation of the Law. That case is the case of Partners. Under the Partnership Act of 1890, Section 39, every partner has a right to require, that the property belonging to the Partnership shall be sold and the proceeds, after the discharge of all debts and liabilities, shall be divided among the partners according to their shares in the capital. As a result, land which is partnership property is treated as Personality and not as Realty.

2. It is treated as Personality, not only as between Partners themselves and their representatives after death, for the purposes of distribution of the partnership assets, but it is also treated as personality for purposes of inheritance as between the persons entitled to the property of a deceased partner.

3. The conversion of Realty into Personality under the Partnership Act takes place not on the date of the dissolution of the Partnership or the death of a partner but at the moment when it became Partnership Property.

4. The doctrine of conversion applies to Partnership Realty unless the contrary intention appears. The reason why partnership agreements convert Realty into Personality is, because a partner ordinarily is not entitled on dissolution to any specific part of the partnership property. But there may be a proviso in the partnership agreement permitting a partner to have specific property, in which case conversion will not apply, there being intention to the contrary.

(2) Conversion by order of the Court

1. Where an order is made by the Court for the sale of Realty, the Realty is treated as being converted into Personality for purposes of succession to the estate of the person whose property was ordered to be sold.

Illus. ABC have equal shares in a Realty. The Court orders the sale of the Realty. This order has the effect of converting their

shares in Realty into Personality, so that the persons entitled to succeed would be the next of kin and not the heir.

2. The following points must be noted :

(i) The order for sale must be within the jurisdiction of the Court

(ii) It is immaterial whether the purpose for which it is sold will or will not exhaust the sale proceeds. The sale may be merely to pay cost. All the same, if the order is for sale, within the jurisdiction, it will effect conversion

(iii) It is immaterial whether it is actually sold or is merely ordered to be sold. Order for sale is enough to effect conversion.

(iv) Conversion takes place from the date of the order and not from the date of the sale.

3. There are two cases in which the order of the Court will not effect conversion for the purpose of inheritance.

(i) Where the Court itself makes an order that such change in the nature of the property shall not affect its devolution on death, in which case the sale proceeds will go to the heir and not to the next-of-kin.

(ii) Where the provision of some statute prohibits a change in the nature of the property from affecting its devolution *e.g.* Section 123 of the Lunacy Act, 1890, which provides that if the property of a lunatic is sold, the proceeds will go to persons entitled to them as though it was not sold.

(3) Conversion by operation of a Contract

1. When there is a binding contract to sell Realty, the Realty is treated as part of vendors Personality. Conversely, the interest of the purchaser is treated as Realty, even if he dies before completion.

2. This is, however, subject to one condition. That is, the contract must be one of which specific performance would be ordered by the Court—*34 Ch. D. 166.*

Mere notice to treat does not suffice to bring into operation the doctrine of conversion. There will be no conversion if the contract is abortive or unenforceable.

(4) Conversion under a contract to lease with an option to purchase

A leases certain property to *B* for seven years, giving him by the lease an option to purchase the property at a certain price during the term. *B* exercises his option

Three questions arise :

(i) Does the exercise of the option effect a conversion ?

(ii) Does it effect a conversion even if the option is exercised after the death of the Lessor?

(iii) From what date does such conversion begin to operate ?

(i) Does the exercise of the option effect a conversion ?

In law, the option given is an offer to sell. The exercise of the option is an acceptance of the offer and when there is an acceptance of the offer, there is a contract. The exercise of the option by resulting in a contract effects a conversion. The answer to the first question is therefore in the affirmative.

(ii) Exercise of the option before the death of the Lessee and after the death of the Lessor.

1. If the Lessee exercises his option *before* the death of the Lessor, i.e., while he is alive, then there is conversion, because the offer conveyed by the option can be legally accepted and a binding contract can arise.

2. If the lessee exercises the option *after* the death, then, on principle, there ought not to be conversion, because there cannot be a contract. An offer cannot be accepted after the person, who make the offer, is dead.

But in *Lawes* vs. *Benett* (1785) 1 Cax 167, it was held that the exercise of the option, even *after* the lessor's death, is good for the purposes of conversion.

3. The rule in *Lawes vs. Benett* being anomalous, is confined in its operation. It is applied as between persons claiming under the lessor. But it is not made applicable as between lessor and lessee.

Illus. A leased certain property to B with an option to purchase. The premises were insured. They are destroyed by fire *before* the option is exercised by B. B, on exercising the option, cannot claim the insurance money as part of his purchase. That is claim as between A and B (1878) 7 Ch. D. 858, 10 Ch. D. App. 386.

(iii) From what date does conversion by contract begin to operate.

1. Conversion becomes operative from the moment when the contract is made.

2. In the case of option to purchase, conversion takes place as from the execution of the lease.

3. For the purposes of profits etc., the property remains real estate until the option is exercised, so that the rents and profits are taken by the heir entitled to Realty.

4. For the purposes of devolution, it is personality.

Conversion by direction of the owner.—Whether contained in a deed or a will.

1. Two things are necessary for conversion by deed or will :

(i) There must be a direction to sell or purchase Realty.

(ii) There must be some person in existence who can be said to have the right to insist upon the direction being carried out Conversion is always for the benefit of some person. If there is no person to claim the benefit, then there need be no conversion.

2. In order to effect a conversion, the direction must be imperative. If direction is only *optional,* there will be no conversion and property will be treated as real or personal, according as to the actual condition in which it is found.

NOTE.—For a difference between a direction which is *really* optional and a direction which is *apparently* optional but really *imperative See Earlom vs. Saunders—(1754) Ambler's Reports 241.*

Direction, if it is optional, must be *express.* Otherwise it will always be held to be imperative.

3. Distinction must be made between direction to sell or purchase Realty and discretion as to the time at which sale or purchase shall be made :

(a) If the direction is imperative, mere fact that it is accompanied by discretion, will not prevent conversion having its effect.

(b) If the direction is imperative, the fact that those to whom the direction was given have failed to carry it out, will not prevent conversion having its effect.

4. Distinction must be made between a simple direction to sell or purchase and a direction, the execution of which, is made dependent *on the request* or *consent* of some other person.

In such a case, whether there will be conversion or not, rests upon the construction of the document :

(a) If the intention of the clause is to enable the person named to *enforce the obligation to convert,* then there will be conversion.

(b) If the intention of the clause is *to control the operation of the direction* by making it subject to application, then there will be no conversion until such application is made.

5. Distinction must be made between the *power to convert* and *direction to convert :*

(1892) 1 Ch. 279.

(1910) 1 Ch. 750.

A mere **power to convert** is not imperative direction and therefore, there **will be** no conversion, where there is mere power.

Illus. :

A borrowed £ 300 from *B* on a mortgage of *A's* property and gave B power of sale by the terms of which the surplus proceeds of sale were to be paid to A, his executors and administrators.

A died intestate, and after *A's* death *B* sold the estate and there were surplus sale proceeds. *To whom would the surplus go* ?

As this was not a direction to sell, the property would devolve according to its *actual* state at the death of A. At the death of A it was Realty, therefore, the heir was entitled to it. If the sale had taken place during the life-time of A, at the death of A it would be personality and would have, therefore, gone to the next-of-kin.

II. TIME FROM WHICH CONVERSION BY DIRECTION TAKES.

1. This varies according as the direction is contained in a will or in a deed.

2. If the direction is contained in a will, conversion will take place as from the death of the testator.

3. If the direction is contained in a deed, conversion will take place as from the date of the execution of the deed—notwithstand-

ing that the trust to sell or purchase is not to arise until after the, settlor's death.

III. Effect of the failure of objects for which conversion was directed in a will or deed.

1. Two cases must be distinguished :

(i) Cases of total failure.

(ii) Cases of partial failure,

(i) Cases of total failure

1. Where there is a *total* failure of the objects *before* or *at the time* when the deed or will came into operation, or before the time at which the duty to convert is to arise, no conversion will take place at all and the property will remain as it was. The reason is that, there is no one who can insist upon the character of the property being altered.

2. The failure must *be prior* failure and not *subsequent* failure.

3. The rule regarding conversion is uniform in the case of total failure and there is no difference between the effects of a direction in a deed and a direction in a will.

(ii) Cases of partial failure

1. Where the purposes have only partially failed, then conversion is necessary to carry out such purposes as have not failed. Consequently the doctrine of conversion would operate and the representative entitled to take the property in the form in which it is directed to be converted.

2. It will be carried out to the extent necessary.

Illus. :

A devises Realty to trustees upon trust to sell and divide the sale proceeds between *B* and *C*. *B* predeceases A and C survives him. Here, sale is necessary in order that *C* may have what A intended to give him, i.e., money. C will take his share in money.

What would happen to the share of *B* ?

It is money *in fact* and *ought* to go to the next-of-kin. But it will go to the heir because conversion to that extent was unnecessary. Heir takes it but as money.

Illus. :

A bequeaths personality to trustees to invest in the purchase of land for B and C. B predeceases A and C survives him. Here, purchase is necessary in order that C may have what A intended to give him, i.e., land. C will take his share in land.

What would happen to share of B ? It will go to the next-of-kin, because, conversion to that extent was unnecessary. But the next-of-kin will take it as land.

Reconversion

1. Reconversion means annulment or cancellation of prior conversion. It is a reversion or restoration of the notional state of the property to its actual state.

2. Reconversion can take place in two ways :

(i) By act of parties,

(ii) By operation of law.

(1) By act of parties

1. This occurs where a person has the right to choose between taking the property in its converted state or in its actual state.

2. Persons who have a right to make such an election and thereby reconvert property are :—

(1) An absolute owner.

(2) A owner of an undivided share—without the concurrence of the co-owner in the case of money to be converted into land but not in the case of land to be converted into money. This is because money is capable of apportionment while land is not.

Illus.—(1) Where money is to be invested into land in the interest of *A* and *B* as joint tenants. A can elect to reconvert without the concurrence of B.

(2) Ques :—Can a remainder man effect a reconversion by electing to take it in its actual state ? This is not clearly settled.

(3) This rule of reconversion by act of parties applies where the owner who has a right to elect and thereby to effect reconversion is subject to the limitation that he must not be under any disability.

Infants and *Lunatics* are persons under disability and cannot, therefore, reconvert. But the Court may direct reconversion on their behalf if it is beneficial to them.

Married woman can reconvert if the property belongs to her for her separate use. If it is not her separate property, then she can do so only with the consent of her husband.

(4) Evidence of election to reconvert—

(i) express declaration of intention in that behalf;

(ii) conduct amounting to election.

(2) Reconversion by Law

Where a person, who is under an obligation to convert property, is in possession of and absolutely entitled to the property after the obligation has ceased, the property is at home and reconverted without any act on his part. Thus—

A converts within 3 years after his marriage with B to invest £ 1,000 in the purchase of lands and settle them upon his wife *B*. B dies within a year of the marriage. Since the obligation to invest money in land and the right to require its investment are both vested in A, the obligation is discharged by operation of law and the money which was converted into land by the covenant is reconverted and passes to the next-of-kin.

Election

I. Distinction between election in law and election in Equity.

(a) *Election in law* is connected with the choice of a party to repudiate a liability arising out of an unauthorized act or to ratify the act and accept the liability.

(b) *Election in Equity* is connected with the choice of a person to accept a gift which is subject to a burden or to reject the gift.

II. Necessity for tie Equitable doctrine of Election.

(i) What is the problem which the doctrine deals with

Nature of the Problem.

A gives his property to *B* by an instrument-deed or a will—and by the same instrument gives to *C* a property belonging to *B*.

What can *B* take under such an instrument ?

Here there are two gifts—

(i) by A to B of A's property

(ii) by A to C of B's property

The gift to *B of A's* property is a valid gift, because *A* is the owner of the property gifted away. The gift to C of *B's* property by *A* is invalid, because it is not authorized by *B*.

Question is, can *B* take the gift from *A* of *A's* property and repudiate the gift of his property by A to C ? It is this problem with which the doctrine of Election deals.

(ii) The doctrine of Election says that the gift to B shall take effect only if *B* elects to permit the gift to C also to take effect.

III. THE PRINCIPLE OF THE RULE.

When a person makes a gift of this sort, equity presumes that in such a gift there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming to all its provisions, and renouncing every right inconsistent with it.

(iii) Courses open to a person called upon to elect.

(A) Two courses are open to a person who is called upon to make an election.

(1) *B* may allow C to take his (B's) property and himself take A's property.

(2) *B* may take A's property and not allow C to take his (B's) property but give him compensation to the extent required to satisfy C.

Illus. :

A gives to *B* a family estate belonging to *C* worth £ 20,000 and by the same instrument gives to C a legacy of £ 30,000 of his (A's) property. C can do either of the two things,

(i) allow B to take the family estate *or*

(ii) keep the family estate and give B £ 20,000.

(B) The former course is called *taking under the instrument.* The latter is called *taking against the instrument.* The following points must be noted in connection with these two modes of Election :

(i) Election against the instrument is allowed in Equity only where the gift is made upon an *implied* condition that the donee shall part with his own property. Where the gift is made upon an *express* condition that the donee shall part with his own property. Equity will not allow Election against the instrument. The donee would take nothing if he refused to comply with the condition.

(ii) No question of compensation arises when a person elects under the instrument.

(iii) Election against the instrument where it is permitted—does not involve a forfeiture of the whole of the legacy but only of a part sufficient for compensation.

IV. CONDITIONS FOR THE APPLICATION OF THE DOCTRINE

(1) The donor must have given the property of the donee to a third person.

(2) The donor must have by the same instrument given his own property to the donee. To this the following must be added.

(3) The property *given to* the donee must be such that it can be used to compensate the third person.

(4) The property of the donee must be alienable.

Note.—The donor will be deemed to be disposing of such interest as he may have in the property and no more.

V. SOME CASES WHICH MUST BE DISTINGUISHED FROM CASES OF ELECTION

(1) Cases of *two* gifts to one person

In such cases the doctrine of election does not apply. They are cases of gifts of his own property.

Here the donee may accept the one that is beneficial and reject the one that is *onerous*—unless the intention of the donor was that the acceptance of the *onerous* was a condition for the grant of the beneficial.

2. Case of *two* properties in one gift.—One beneficial, the other onerous.

The beneficiary must take both or neither unless an intention appears to allow him to take the one without the other.

VI. Conclusion

(1) Conversion and election are doctrines which illustrate the maxim of Equity—Equity looks to intention.

(2) That being so there would be no election if there was no intention on the part of the donor to put the donee to election.

I. Performance

1. *The problem* :—A covenants with B to do a certain act. A does an act which can wholly or partly effects the same purpose *i.e.* available for the discharge of the obligation arising under the covenant but does not relate the act to the covenant. The question is *how is this act to be construed ?* Is it to be construed that it is an independent *act* quite unconnected with the covenant or is it to be construed that the intention of A in doing this *act* was to perform the obligation. The answer of equity is that the *act* must be treated as being intended to perform the obligation under the covenant.

2. *Principle* :—The principle underlying the doctrine of Performance is that, equity presumes that every man has an *intention* to perform his obligation and when he does an *act* which is similar to the one he promised to do, then equity gives effect to that intention.

3. *The difficulties that would occur if this principle was not recognized.*

Illus :

A convenanted on his marriage to purchase lands of the value of £200 a year and to settle them for the jointure of his wife and to the first and other sons of the marriage in fail.

A purchased lands of that value but made no settlement, so that, on his death the lands descended to his eldest son.

The eldest son brought a bill in equity founded on his father's marriage-articles to have land purchased out of the personal estate of the father of the value of £ 200 a year and settled to the uses in the marriage-articles. But for the doctrine of *performance* the man would get both.

II. The cases in which the questions of Performance arise fall into classes :

(i) Where there is a covenant to purchase and settle lands, and a purchase is in fact made.

(ii) Where there is a covenant to leave personality to an individual and the covenanter dies intestate and the property thereby comes in fact to that individual.

III. Cases arising under the First Class

(i) *Illus,* already given.

Points to be noted.

(i) Where the lands purchased are of less value than, the lands covenanted for, they will be considered as purchased in part performance of the contract.

(ii) Where the covenant points to a future purchase of lands, lands of which the covenantor is already ceased at the time of the covenant, are not to be taken in part performance.

(iii) Property of a different nature from that covenanted to be purchased by the covenantor, is not subject to the doctrine of Performance.

IV. Cases that fall under the second class

(i) Covenant is to leave certain money.

A covenanted previously to his marriage to leave to his wife £620. He married and died intestate. His wife's share under the intestacy was less than £ 620.

The wife sued for the performance of the covenant. The question was, having received £ 620 on intestacy, was it not a performance of the covenant. It was *held* that it was, so that the widow could not claim her share on intestacy and £ 620 over and above as a debt under the covenant.

(2) In this case, the covenant was wholly performed. But even if the amount received was less than the amount due under the covenant, the doctrine of performance would apply and the convenant would have been held to be performed *pro tanto.*

(3) Two points to be noted :

(i) Where the covenantor's death occurs at or before the time when the obligation accrues, there is performance.

(ii) Where the covenantor's death occurs after the obligation has *accrued due,* there is no performance.

Satisfaction

I. *Problem.*—A is under an obligation to B. A makes a gift to B. The Question is : Is the gift to B to be taken as a gift or is the gift to B to be taken as satisfaction of A's obligation to B ?

II. There is a similarity between satisfaction and performance. There are fundamental distinctions between the two.

(1) In performance, the act done is available for the discharge of the obligation, but is not related in specific terms to the obligee. In satisfaction, it is related to the obligee but not in discharge of the obligation.

(2) In performance, whether the covenant has been performed depends, not upon the intention but, upon whether that has been done which was agreed to be done. The question, whether a gift satisfies an obligation, depends upon the intention of the donor.

(3) If an obligation has been performed-according to its terms, the obligor is discharged. If an obligor makes a gift by will in satisfaction of his liability, it rests with the obligee either to accept the gift or decline it. If he accepts it, he looses the right to enforce his obligation, if he declines it, he retains his original rights.

II. Intention is that, the gift is in satisfaction of the prior obligation.

III. Cases in which the question of satisfaction arises fall into two classes:—

(i) Cases in which the prior obligation arises from an act of bounty.

(ii) Cases in which the prior obligation is of the nature of a debt.

IV. Class of cases in which the prior obligation arises from an act of bounty.

In this class fall two kinds of cases—

(A) Satifaction of legacies by portion.

(B) Satisfaction of portions by legacies.

(A) *Satisfaction of legacies by portion*

Portion—That part of a person's estate which is given or left to a child.

Illus.:

A has three sons B, C, D. He makes a will and in that will gives a legacy to each of his sons. Subsequently to the making of his will, A makes an advancement of a certain sum of money.

2. Here, there is a legacy and afterwards a portion. Are they cumulative or are they alternative. Is the child which has got a portion also entitled to get the portion ? Or is the claim for legacy satisfied by the subsequent portion given by the father ?

3. The answer of equity is that, a child cannot get both, legacy and a portion. The claim for legacy shall be held to be satisfied by the subsequent grant of the portion. This is called the rule against *double portions.*

II. *Satisfaction of Portion by Legacies*

1. This is the converse of the first. In the first class of cases, there is first legacy then a portion. In the second, there is a portion first and then there is a legacy.

2. In the former case, the question was whether a legacy by will was satisfied by a subsequent portion. In this, the question is whether the obligation to give a portion is satisfied by a subsequent legacy.

3. The answer here is the same as in the former case. The same rule against double portion applies. So that a portion will be satisfied by a legacy.

4. When the will precedes the settlement, it is only necessary to read the settlement as if the person making the provision had said, "I mean this to be in lien of what I have given by my will".

But if the settlement precedes the will, the testator must be understood as saying, "I give this in lien of what I am already bound to give, if those to whom I am so bound, will accept it".

5. The same rule applies in the case of a portion followed by a portion.

II. *Limitations on the rule of double portions*

1. The rule does not apply :

(1) In the case of legacy and a portion—where the legacy is *expressed* to be given for a particular purpose and the portion subsequently advanced is for the same purpose.

(2) In the case of portion and legacy, and in the case of portion and portion—where the property is actually transferred to the child and then a provision is made either by way of a legacy or portion—in short it applies only where the first portion is only a debt.

(3) Where the person, who makes the provision is the parent or a person *in loco parentis*— If, therefore, a person gives a legacy to a stranger and then makes a settlement on the stranger of *vice versa,* the stranger can take both, the rule against double portion does not apply to him:

(i) An illegitimate child is a stranger;

(ii) a grand child is also a stranger:

(iii) a stranger cannot take advantage of the satisfaction of a child's share.

III. *Cases of two Legacies given by the same will or by a will and Codial.*

1. Question is whether the second Legacy is intended to be additional to the first or to be merely repetition.

2. The leading case is *Hooby vs. Hatton, 1 Bro. C. C. 390 N.*

3. Two class of cases to be considered separately—

(1) Where the subject-matter of the legacy is a thing.

(2) Where the subject-matter of legacy is money.

4. *Where the subject-matter of the Legacy is a thing,* Rule : Where the same thing is given twice—not additional but repetition.

5. *Where the legacies are pecuniary legacies :*

(1) The rule varies according as the gifts are contained in the same instrument or in different instruments.

(2) Two pecuniary legacies in the *same* instrument.

Rule:

(i) If equal—repetition.

(ii) If unequal—cumulative.

3. Two pecuniary legacies in *different* instrument.

Rule.—They are cumulative.

Exception.—If *same* motive is expressed for both gifts and the *same* sums are given—then repetitition.

B. Cases in which the prior obligation is of the nature of a debt.

1. Cases may be divided into two classes—

(i) Satisfaction of debt by a Legacy.

(ii) Satisfaction of debt by a portion.

(i) *Satisfaction of debt by a Legacy.*

(1) This case arises where a debtor, without taking notice of the debt bequeathes a sum by way of legacy to his creditor. Question is : Is the legacy to be taken as satisfying the debt or is the creditor entitled to the legacy and also the debt ?

(2) *Rule.*—That the legacy shall be taken as satisfying the debt.

(3) *Limitation on the Rule.*—The rule does not apply in the following cases—

(i) Where the legacy is of lesser amount than the debt—no satisfaction, even *protanto.*

(ii) Where the legacy is given upon a contingency.

(iii) Where the legacy is of an uncertain amount— *e.g.* residue.

(iv) Where the time fixed for payment of the legacy is different from that at which the debt becomes due—so as to be equally advantageous to the creditor.

(*v*) Where the subject-matter of the legacy differs from the debt, *e.g.* land.

(ii) *Satisfaction of debt by Portion.*

(1) Such a case arises where the father becomes indebted to his child and then advances a portion to him in his life-time. The Question is : Can the child claim both—the debt as well as the portion ? Or Is the debt satisfied by the portion ?

(2) *Rule.*—Debt is satisfied by the portion.

(3) This rule is subject to the same limitations.

V. Difference between Performance and Satisfaction.

Further notes are not available—ed.)

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2. NOTES ON THE DOMINION STATUS

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DOMINION STATUS

1. The Statute of Westminister to some extent lays down and codifies the law which regulates the constitutional relationship of these parts of the British Empire which is known as the British Commmonwealth of Nations.

2. The Statute of Westminister applies to the Dominions and establishes for them what is called Dominion Status. Our inquiry will be directed to understand the meaning of Dominion Status. Before approaching the subject we must ask.

I. 1. What is a Dominion ?

A Dominion is a colony which is declared to be a Dominion by the Statute of Westminister.

2. What is a Colony ?

A Colony is a British Possession other than U. K. and India.

3. What is a British Possession ?

A British Possession is any part of the British Empire exclusive of the United Kingdom over which the King exercises sovereignty.

4. What is British Empire ?

(British Empire)* denotes the whole of the territories over which the King possesses sovereignty or exercies control akin to sovereignty. It includes therefore all the King's Dominions, over which he is sovereign, and the protectorates and Protected States whose foreign relations are controlled by the Crown.

It also includes the mandated territories.

II. What is Dominion Status ?

1. The subject could be better under (stood)* if we compare the system of Government inaugurated by the Statute of Westminister with the system of Government which was in operation before it came into force.

2. The system which was in operation was known as Responsible Government. We must therefore grasp as a first step the characteristics of Responsible Government.

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* Inserted these words are erased in the ms. either on account of being eaten by termites or by afflux of time.

3. Why Responsible Government came in some colonies and why it did not come in others ?

4. The Government of a colony differed according to the nature of the colony.

5. Colonies fall into two classes:

(1) Colony by settlement.

(2) Colony by Conquest or Cession.

(1) Colony by settlement

1. Thus in a colony by settlement there came up the inevitable conflict between an irresponsible executive and representative legislature, a conflict of mandates.

2. Responsible Government had to be introduced in these colonies by settlement in order to solve this conflict.

3. THE NATURE OF THE RESPONSIBLE GOVERNMENT.

The position of the King in relation to settled colonies differs from his position in relation to conquered colonies.

The King stands to possession acquired by settlement in a position analogous to his status in the United Kingdom. *10 App. Calls 692/(744).* He is possessed of the executive power and has authority to establish Courts of law, but not celesiastical Courts *[3 Moo. P. C. 115, 1865 : 1 Moo PI.C.C. 411,1863].* But he cannot legislate, and if laws are to be passed, this must be done—

(1) by a legislative body of representative character on the analogy of the U.K.

(2) where this form of legislation would be difficult to carry out, parliamentary authority must be obtained authorizing the establishment of a different form of Constitution.

(2) Colonies by Conquest

In these, the King possesses absolute power to establish such executive, legislative and judicial arrangements as he thinks fit, subject only to the condition that they do not contravene any Act of Parliament extending to all British Possession.

But this right is lost by the grant of a representative legislature unless it is expressly retained in whole or in part. If not so retained, power to legislature as to the Constitution or generally can only be recovered under the authority of an Act of Parliament. *1835 2 Kuapp. 130 (152) Jehson v/s Pura; 1932 A.C. 260.*

1. The Statute of Westminister applies to :

(1) The Dominion of Canada,

(2) The Commonwealth of Australia,

(3) The Dominion of New Zealand,

(4) The Union of South Africa,

(5) The Irish Free State,

(6) New Foundland.

2. This statute calls these colonies as Dominions and confers on them what is called Dominion Status.

3. These Colonies had Responsible Government before the Statute of Westminister.

What is the difference between Responsible Government and Dominion Status ?

Mechanism of Responsible Government.—

(1) THE CLAIM BY THE COLONY TO COLONIAL AUTONOMY IN MATTERS WHICH AFFECTED THEM.

(2) THE CLAIM TO UNLIMITED SOVEREIGNTY BY THE IMPERIAL PARLIAMENT.

These two claim are contradictory. A self-governing colony is a contradiction in terms.

The solution of this question involved two questions :

(1) How was the divison of authority to take place between the Colonial and Imperial Governments.

(2) How were the powers given to each were to be exercised by each.

The division proposed was not along the lines of imperial and colonial legislative competence.

All legislation was to be within colonial competence except what was barred by the colonial laws, but some of it would be liable to veto by the Imperial Government not on the ground that it was beyond the competence of the colonial legislature, but it affected some Imperial interest.

The matters of Imperial concern were not reduced to writing by enumeration. The Imperial Government was free to decide whether any particular matter was or was not of Imperial concern.

The following provisions were a feature of the Constitution of these colonies:

(1) The appointment of the G. and G.G.* by the Crown on the advise of the Imperial cabinet.

(2) The Right of the G. G. to act otherwise than the advice of his ministers.

(3) The power of the Governor to Reserve Bill for the pleasure of the King on the advice of the Imperial Government.

(4) The Power of Disallowance by the King on the advice of the Imperial Government.

The terms of the Statute of Westminister

I. It frees the Dominion Legislature from the overriding effect of the laws made by the British Parliament:

(1) It abrogates the Colonial Laws Validity Act.

(2) It gives the Dominion Legislature to repeal any U. K. Act in so far as the same is the part of the Dominion.

II. It puts limitations upon the legislative sovereignty of the British Parliament:

(1) No Act of Parliament passed after December 11, 1931 shall extend, or be deemed to extend to a Dominion as part of the law of that dominon unless it is expressly declared in the Act that the Dominon has requested and consented to the enactment thereof.

(2) Any alteration in the law touching the succession to the throne or the Royal Style and Tides requires the assent of the Parliaments of the Dominion as well as of the United Kingdom.

III. The Statute does not alter the other provisions :

(1) The appiontment of Governor General.

(2) The Reservation of Bills.

(3) The Disallowance of Bills.

But a great change has taken place in the exercise of these powers.

Right of advice to the Crown.

* * * * *

Dominion Status does not mean sovereignty.

* * * * *

2. Constitution of the United Kingdom has been dealt with.

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* Means Governor and Governor General—ed.

* Portion missing—ed.

3. India will not be dealt with here. So also Protectorates and Mandated Territories.

4. Deal only with the Constitutional Organization of the Colonies.

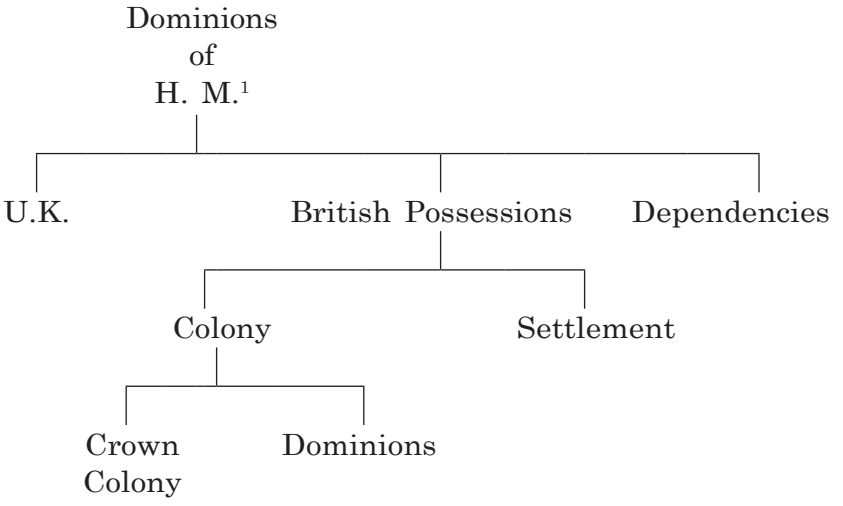
5. The Constitutional Organization of the Colonies differs according to the mode of the acquisition of the Colony.

6. Two methods.

(1) Settlement

(2) Conquest or Cession.

* * * * *



Dominions

1. The Dominion Office was established in 1925 to take over Dominions' business from the colonial office.

2. At first the Secretaryships for the Dominions and for the colonies were held by the same minister, but in 1930 a separate S of S[2] for the Dominions was appointed.

3. The Dominion Office deals with business connected with the Dominions, Southern Rhodesia, the South African High Commission [i.e. Basutoland, Bechunaland, Protectorate Swaziland], Overseas settlement, and business relating to

[1] His Majesty—ed.

[2] Secretary of State—ed.

Imperial, Conferences. See Sir G. V. Fiddes—*The Dominions and Colonial Offices.*

Old Halsbury, I. p. 303.

662. The dominions of the Crown include—

(a) The U. K. and any Colony, plantation, island, territory or settlement within H M's dominions and not within the U.K.

(Naturalization Act, 1870, 33 Ne. c 14 s. 17)

(b) Places situated within the territory of a Prince, who is subject to the Crown of England in respect of such territory.

[*Crow and Ramsay (1670) Vaugh. 281*]

(c) British ships of war and other public vessels (*Parliament V/s. Belge. (1880)5 P.D. 197.*)

(*d*) British Merchantmen on the high seas [1870 S. R. 6Q. B. 31. *Marshall v/s Murgatroyd*] and probably even in the territorial waters of a foreign country [*Compare R v/s Carr and Wilson (1882) 10 Q.B.D. 76*].

Halsbury X. p. 503 para 856

1. "British Possession" means any part of H M's dominions exclusive of the U. K.; and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature are deemed to be one British Possession. [Interpretation Act 1889 (*52 & 53 Vict. c. 63*) *S. 18 (2)*].

2. A Colony is any part of H M's dominions exclusive of the British Islands and British India; and where, parts of such dominions are under both a central and a local legislature, all parts under the central legislature are deemed one colony [*Ibid.* S. 18(3)].

3. A British settlement means any British Possession which has not been acquired by cession or conquest and is not for the time being within the jurisdiction of the legislature of any British possession. [British Settlements Act, 1887 (*50-51 Vic. C. 54*) S. 6].

4. The expression 'Dependencies' is used to signify places which have not been formally annexed to the British dominions, and are therefore, strictly speaking foreign territories, but which are practically governed by Great Britain, and by her represented in any

relations that may arise towards other foreign countries. Most of them are "Protectorates" that is territories placed under the protection of the British sovereign, generally by treaty with the native rulers or chiefs. Cyprus and Weihaiwei are foreign territories held by Great Britain under special agreements with their respective sovereigns, but administered under the Foreign Jurisdiction Act, 1890 [53-54 Vic. C. 37], on the same general lines as protectorates. India including both the Native States and the strictly British territory of that Empire, is frequently spoken of as our great dependency.

5. Crown colonies are those in which the Crown retains complete control of the public officers carrying on the Government, and the legislative power is either delegated to the officer administrating the Government [S. S. Gibralter, Ashanti, Virgin Islands, St. Helena and Basutoland] or is exercised by a Legislative Council which is nominated by the Crown either entirely or partly the other part being elected. In these colonies, with seven exception, the Crown has reserved to itself the power of legislating by Order in Council.

Protectorates although not parts of H M's Dominions are administered in much the same manner as Crown colonies.

Dominions are those colonies which possess elective legislatures to which the executive is responsible, as in the U. K. the only officer appointed and controlled by the Crown being the Governer or G. G.

Halsbury X, p. 521

885. There is no statutory or authoritative definition of the term "protectorate" although it appears in two recent Statutes. Protectorates are not British territory in the strict sense ; but it is understood that no other civilized power will interfere in their affairs. They are administered under the provisions of orders in Council issued by virtue of powers conferred upon H. M. by the Foreign Jurisdiction Act, 1890 "or otherwise vested in His Majesty" which latter phrase may be taken to be intended to bring in aid any exercise of the Royal prerogative that may be necessary to supplement H. M's statutory powers.

Halsbury XIV, p. 420

For a recent treatment of the meaning of "dominions" see *R v/s Crewe 1910 S. K. B. 576, 607, 622.*

Halsbury IX, p. 16

The authority of the King extends over all his subjects wherever they may be, and also over all foreigners who are within the realm. The jurisdiction of English Courts of Law, however, is limited, first, by the stipulations contained in the enactments by which the kingdoms of Scotland and Ireland were incorporated in the United Kingdom ; Secondly by the Charter of Justice, letters patent and statutes affecting particular colonies; and thirdly by the consideration that no English Court will decide any question where it has not the power to enforce its decree.

The jurisdiction of each particular Court is that which the King has delegated to it, and this delegation has been complete, for the King has distributed his whole power of prosecution to diverse Courts of Justice.

* * * * *

Development of Dominion Status

1. There is first the claim to unlimited sovereignty by the Imperial Parliament and Government stated in its logical perfection by Lord John Russell.

2. There is second the claim to colonial autonomy an effective demand that, in matters which interested them, the colonies should manage their own affairs.

3. There is third, the contradiction between the two. A self-governing dependency is a contradiction in terms.

Solution

On the one hand, the Imperial Parliament granted to a colony a sphere of activity in which the colonial legislature, executive and judiciary had authority to exercise governmental power. In this sphere the colony was sovereign.

On the other hand, the Imperial Parliament had the authority and full legal power, as and when it saw fit, to withdraw or limit the rights of the Colony to exercise power within a prescribed sphere, either by repealing or amending the Constituent Act of the Colony or by passing an Imperial Act explicitly applying to some subject within the jurisdiction of the Colony.

Two Questions: (1) How was the division of authority to take place between the Colonial and Imperial authority ? (2) The method of exercising the powers given to each.

(1) The division proposed was not along the lines of Imperial and Colonial legislative competence.

All legislation was to be within colonial competence, but some of it would be liable to veto by the Imperial authority, not on the ground that it was beyond the competence of the colonial legislature, but because it affected some specified Imperial interest.

(2) It was advocated that the possible matters of Imperial concern should be reduced to writing by enumeration of those matters which were deemed of Imperial concern. The British Government refused to bind itself specifically in this way [and the provisions were not allowed to stand in the Australian Bills].

(3) How were the activities of the Colonial and Imperial authorities to be adjusted and co-ordinated so that confusion and overlapping and conflict might be avoided? The solution was found in the following :

(1) The Powers of Reservations.

(2) The Powers of Disallowance.

(3) The appointment of the Governor General.

(4) The nature of responsible Government in the colonies.

(5) Right of the British Government to tender advice to the Crown.

(6) Colonial Laws Validity Act of 1865.

(4) The nature of responsible Government in the Colonies.

The executive Government was vested in the Governor, who was empowered to appoint to his executive council those persons whom he thought fit, in addition to those, if any, who by law were members of it. While in one or two cases it was

stipulated in the Constituent statute that ministers were to be members of the executive council or that members of the executive council were to be, or were within a given period, to become members of one or other house of the legislature. In no case is the executive council required by law to be composed of ministers and ministers alone.

The executive council includes but does not necessarily consist only of ministers. In certain cases there is no legal necessity for members of the executive council to be members of either house of legislature.

The Act prescribed a sphere of activity within which the colonial legislature had power to make laws for the peace, order and good Government of the colony. Thus far the statute.

The instructions to the Governor empowered him to govern with an executive council whose advice he might disregard if he thought fit.

Responsible Government was based, not upon a statutory basis, but on the faith of the Crown.

Character of Inter-Imperial Relations

In the Commonwealth Merchant Shipping Agreement, the Dominions appear in a position of complete equality, comparable with that of contracting states, and differences arising out of the agreement would seem suitable for reference to the inter-Imperial tribunal contemplated by the Imperial Conference 1930. [Cmd. 3994, Part VII].

But the relations are not governed by International Law. This was asserted clearly in 1924, when the Irish Free State registered with the Secretariat of the Leagus of Nations, the Articles of agreement for a Treaty of December 6, 1921 on the score that it was a treaty within the meaning of Article 18 of the covenant of the League of Nations, and the British Government insisted that neither the covenant nor the conventions concluded under League auspices were intended to govern relations *inter se* of parts of the Commonwealth [Keeth. R.G. II. 884, 885.].

The Imperial Conference 1926, took this view, holding that it had been determined in this sense by the Legal Committee of the Arms Traffic Conference of 1925 [Cmd. 2768 p. 23.]

The Dominions save the Irish Free State as well as the United Kingdom, excluded inter-imperial disputes from those to be submitted to the Permanent Court of International Justice when accepting the optional clauses of the Statute of the Court in 1929 [Cmd. 3452 p. 415] and similarly when accepting the General Act of 1928 for the Pacific Settlement of International disputes [Cmd. 3930 pp. 14, 15],

The inter-Imperial preferences are a domestic issue, on which most favoured nation clauses of treaties with foreign states do not operate.

Allegiance

The bond of a common allegiance involving a common status as British subjects, and this bond is one which cannot be severed by the unilateral action of any part as follows from the formal declaration in the Preamble to the Statute of Westminister that inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations and as they are united by a Common allegiance, any alteration in the law touching the succession to the throne or the Royal style and titles, requires the assent of the Parliaments of the Dominions as well as of the United Kingdom.

While the Preamble does not make law, it expresses a convention of the constitution which would render it very difficult for the Crown or its representative to assent to a bill passed by any single part which violated this principle of the unity of the British Commonwealth of Nations on a basis of equality of its status.

Note.— In approving the report of the Conference of 1929, the Union Parliament recorded that the proposed Preamble "shall not be taken as abrogating from the right of any member of the British Commonwealth of Nations to withdraw therefrom".

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But this view has never been formally adopted by the Imperial Conference.

The equality of status of the Dominions and the U.K. necessitates the consideration of a mode of deciding inter-Imperial disputes [cmd. 3479 p. 41].

For this purpose, the imperial conference 1930 decided that such disputes should be dealt with along the line of *ad hoc* arbitration, on a voluntary basis. The procedure is to be limited to differences between Government and only such as are justiciable.

The Tribunal is to be constituted *ad hoc* for each dispute ; there are to be five members, none drawn from outside the British Commonwealth of Nations.

Each party shall select one from the States members of the Commonwealth of Nations, not parties to the dispute, being persons who have held or hold high judicial office or are distinguished jurists and one with complete freedom of choice. The chairman shall be chosen by these four assessors may be employed if the parties desire-expenses to be borne equally. Each party shall bear those of presenting its case.

External Sovereignty of the Dominions

They have autonomy. But not status. (They Have)* ceremonial status, but not *legal* ; *de facto* but *not de jure*

For many purposes the Dominions are endowed with a considerable amount of international personality independent of the United Kingdom. But the Common allegiance and the Common Crown interfere with the idea of each Dominion being a distinct sovereign state connected merely in a personal union.

The issue as to the possibility of neutrality in war has been discussed, but only claimed by the Nationalist Government in South Africa. [Kerth DGII 867 868 71, 72, *Sovereignty of Dominions of D. 300-304 463-471*].

It is open to serious doubt if the King could declare war without automatically involving the Dominions in the war.

* Inserted—ed.

The implications of Dominion Status

1. Does it imply sovereign status ?

They have the functions of a sovereign state. But they have not the status of sovereign states.

2. Does it imply the right to secede ?

* * * * *

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Right of aliens to enter British territory. p. 27

Subject—compulsion of, to leave the Realm p. 388

Citizenship and allegiance

Vol. XVII p. 270

Vol. XVIII p. 49

Law of citizenship in the United States

by

Prentiss Webster

Albany : 1891

Webster

"The distinction between citizens proper, that is, the constituent members of the political sovereignty, and subjects of that sovereignty who are not, therefore, citizens is recognized in the best authorities of the public law". This distinction is true. The further question of who are and who are not citizens has its difficulties. Accept the definition of citizenship to be the enjoyment of equal rights and privileges at home and equal protection abroad, and consider the question from this standpoint, from which alone it should be treated, for we have no law in the U. S. A. which divides our citizens into classes or makes any difference whatever between them. We then discover the importance that the equal rights of citizens when at home should maintain when abroad, because questions as to citizenship are determined by municipal law in subordination to the law of Nations. Therefore, the value of citizenship should not be underestimated."

Webster

View of Roman Law

1. It was by man that the body politic was organised, and in entering the organization with his fellow men, man followed the exercise of his natural rights and became an ingredient of the society of which he, with others, became members.

2. By the organization formed as of man and by man, man was so incorporated into the body politic that he could not depart.

3. Although in the early days of Rome, they alone could call themselves Roman citizens who were free born and born in Rome, yet very soon thereafter, foreigners were admitted to citizenship by authority of the legislative body. Later, as Rome advanced in her conquest of the neighbouring states, to these states the legislative authorities conferred charters by which the citizens of such states were admitted to Roman citizenship and their former citizenship was abolished.

4. Cicero lays down the rule, "that every man ought to be able to retain or renounce his rights of membership of a society," and further adds, "that this is the firmest foundation of liberty." Under this the Romans received all who came and forced none to remain with them.

5. This view of the Roman Law was based upon natural law.

Effect of Invasion

6. After the downfall of Rome this principle of natural law gave way to the principles of feudalism as introduced by the invaders.

7. The invaders having conquered both the people and their lands, organized their Government, as being in a prince who was all powerful over his subjects. The relation as between man and man and his relation to the Government was forced and involuntary. The natural rights of man as being in man were disavowed.

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3. THE LAW OF SPECIFIC RELIEF

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Nature that the law permits its Specific Performance

(ii) Where the Plaintiff is a person in whose favour Specific Performance can be granted.

(iii) Where the Defendant is a person against whom Specific Performance might be granted.

The question is : Is the Court bound to grant Specific Relief in such cases ?

The answer to this question is contained in Sec. 22.

(A) Section 22 lays down general rules—(1) It says that Specific Relief is discretionary. The Court may grant it or may refuse it. The Court is not bound to grant it merely because it is lawful.

(2) The discretion of the Court is not arbitrary, sound and reasonable, guided by judicial principles.

(B) Section 22 also specifies cases in which Court may exercise discretion not to grant Specific Performance and cases in which Court may excercise discretion to grant Specific Performance.

Cases in which Court may exercise discretion not to grant Specific Performance

(i) Where Specific Performance would give unfair advantage over the Defendant.

(ii) Where Specific Performance would involve some hardship on the Defendant which he did not foresee and non-performance would not involve such hardship on the Plaintiff.

Cases in which Court may exercise discretion to grant Specific Performance

Where the Plaintiff has done substantial acts or suffered losses in consequence of a contract capable of Specific Performance.

Damages and Specific Performance

Sections 19, 20, 29.

Two remedies for breach. Are the mutually exclusive or are they complimentary ? Does one bar the other ?

These are question which are considered in Sections 19, 20, 29. The rules contained in these three may be summarized as below :

19. (i) In the same suit, a Plaintiff can ask for both in addition or in substitution.

(iii) In a suit where Court desides not to grant Specific Performance Court can grant Compensation to Plaintiff if entitled.

(iv) If one suit Court may grant compensation in addition to Specific Performance if it comes to the conclusion to Specific Performance is not enough.

20. (v) The fact that liquidated damages have been agreed upon is no bar to Specific Performance.

29. (vi) If suit for Specific Performance is decreed, it will be a bar to a suit for damages.

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PART I

INTRODUCTORY

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I. The enactment which defines Specific Relief.

1. The law as to specific relief is contained in the Specific Relief Act I of 1877.

2. Before the passing of the Specific Relief Act the law as to Specific Relief was contained in Sections 15 and 192 of the Civil Procedure Code (Act VIII) of 1859.

3. The law was fragmentary. Section 15 dealt with declaratory decrees and Section 192 dealt with Specific performance of contracts.

4. The Act aims to *define* and *amend* the law relating to Specific Relief obtainable in Civil Court.

II. The nature of the Law of Specific Relief

1. Laws fall into *three* categories,—

(a) Those which define Rights.

(b) Those which define Remedies.

(c) Those which define Procedure.

2. *Illustrations.*

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3. The Law of Specific Relief belongs to the second category. It is a law which deals with Remedies.

4. The term *'relief'* is only another word for remedy which a Court is allowed by law to grant to suitors.

III. What is meant by Specific Relief ?

1. Specific Relief is one kind of remedy recognized by law. Its nature can be best understood by distinguishing the different remedies which the law allows to a person whose right has been invaded.

2. A right to be real must have a remedy. No right can give protection if there is no remedy provided for its vindication. Law therefore invariably provides a remedy for a breach of a right.

3. The general remedy provided by law for a breach of a right is *monetary repairation* called compensation or damages.

4. This remedy of money compensation is not an adequate remedy in *all* cases. The loss of some things can be compensated by payment of money. The loss of others cannot be compensated by money. Their loss can be made good by the *return* of the very *same* article. Similarly, the refusal to perform an obligation may be compensated by money. In other cases, the only adequate remedy is to compel the performance of the very *same* obligation.

5. Thus there are two kinds of remedies provided by law :

(a) those under which the suitor is granted the *very same* things to which he is entitled, by virtue of the right he has acquired against his opponent; and

(b) those under which the suitor is granted not the very same thing to which he was entitled, but money compensation or damages in lieu thereof.

6. Specific Relief is the name given to the first kind of remedy.

7. The relief is called specific because it is relief in *specie,* i.e. in terms of the very thing to which a suitor is entitled.

IV. What Specific Reliefs are provided for in the Specific Relief Act.

1. The forms of Specific Reliefs provided for in the Specific Relief Act form under four divisions :

(1) Taking possession of property and delivering it to the claimant who is out of possession.

(2) Requiring Performance of Contract.

(3) Compelling the Performance of a Statutory Duty.

(4) Preventing the doing of a wrong.

2. The subdivisions of the 4th category are :

(i) Rectification of an instrument.

(ii) Rescission of an instrument.

(iii) Cancellation of an instrument.

(iv) Declaration of status.

(v) Receivers—appointment of—

(vi) Injunctions.

V. Other Laws defining Specific Reliefs.

1. These are not the only specific remedies administered by courts in India. There are other specific remedies recognized by the Indian Law and which are enforced by courts in India.

2. These specific remedies outside the Specific Relief Act are:

(i) Taking an account of the property of a deceased person and administering the same.

(ii) Taking accounts of a trust and administering the trust property.

(iii) The foreclosure of the right to redeem or sale of the mortgaged property.

(iv) Redemption and reconveyance of mortgaged property.

(v) Dissolution of partnership, taking partnership accounts, realizing assets ; discharging debts of partnership, etc.

3. We are not concerned with these.

PART II

Consideration of the
Different Kinds of Specific Reliefs
Recognized by the Act.

Division I

Recovery of possession of Property
Sections 8, 9, 10 and 11.

1. Recovery of Possession of immoveable property —Sections 8, 9.

2. Recovery of Possession of moveable property —Sections 10, 11.

Recovery of Possession of Immoveable Property.

1. The Question is—

When can a person, who has lost possession of immovable property and sues to recovery possession thereof—be granted possession thereof instead of damages or compensation for the loss of possession.

2. The emphasis is on the nature of the relief—i.e. the recovery of the specific piece of property of which possession is lost. The relief by way of damages or compensation is always open under the general law. Question is when can an injured person insist upon specific relief for the recovery of property.

3. The cases in which a person has lost possession of immoveable property fall under two classes.—

(i) The case of a person who is entitled to possession but who has lost possession.

(ii) The case of a person who had possession but who has lost possession.

4. The difference consists in *being entitled to possession* and *being in possession.*

5. These two cases are dealt with in Sections 8 and 9. Both provide that in either case the Plaintiff shall be entitled to Specific Relief by way of recovery of property.

6. Requirements of Section 8.

(i) Prove that you have a title to possession and you will succeed in recovering possession by way of specific relief.

7. Requirements of Section 9.

1. Prove that you were in possession within six months prior to the date of suit.

2. Prove that you were dispossessed *without your consent* or *otherwise* than in due course of law.

A *in possession is dispossessed by* B

I.	a with title	"	is	"	without title
II.	a without title	"	is	"	with title
III.	a without title	"	is	"	without title

1. In *all* three cases A can recover possession if he brings suit under Section 9 i.e. within six months—irrespective of the question of title.

2. If he brings a suit after six months, he must rely on title so that A can recover possession in

(i) ——because he has a title.

(iii) ——because he has a possessory title.

But cannot recover in (ii) because B has title and A has not.

Who can maintain a suit under Section 10

1. According to Section 10, only a person *entitled* to the possession of the suit property can sue.

2. Meaning of "entitled to possession".

3. Title to possession may arise

(i) as a result of ownership or

(ii) independently of ownership, as a temporary or special right to present possession

4. Title to possession as a result of ownership.

(i) Ownership may be bare legal ownership or it may be legal ownership coupled with beneficial interest.

(ii) It is not necessary that a legal owner must have also a beneficial interest in the property to have a right to maintain a suit under Section 10.

(iii) This is made explicit in Explanation I, where a trustee is permitted to sue for the possession of the trust property although he has no beneficial interest in it.

5. Title to possession independently of ownership

1. Title to possession independently of ownership may arise in two ways.—

(i) By the act of owner.

(ii) Otherwise than by the act of the owner.

(I) Title to Possession by the Act of The Owner

(i) The owner may by his own act create in another person a right to the possession of the thing which belongs to him as *owner*.

(ii) Illustrations of such a right to possession are to be found in Bailment and lien.

(1) Simple bailment cover the cases of.—

(i) loan

(ii) custody

(iii) carriage

(iv) agency.

(2) Other Bailments.

1. Pawn

2. Hire.

2. Difference between Simple Bailment and other Bailments of Pawn or Hire.—

(i) In Simple Bailment the owner (Bailer) has a right to possession and the Bailee has legal possession. The Bailee being entitled to possession can maintain a suit to recover possession. The Bailer having a right to possession can also maintain a suit to recover possession against any person other than a Bailee.

(ii) In other Bailments of Pawn or Hire—The Bailer has no right to possession. The right to possession is vested in the Pawnee or Hirer during the continuance of the Bailment and it is only the Bailee (Pawnee or Hirer) who can maintain a suit for the recovery of possession.

3. Lien is an illustration of a right to possession arising out of the act of the owner.—

(1) Lien is a right to possession of a thing which arises out of debt due by the owner.

(2) The right to possession of the owner is thus temporarily vested in another.

4. All that is necessary to maintain a suit is a right to present possession.—

(i) The right of present possession may arise out of ownership or may not.

(ii) Right to present possession may be special or temporary.

(II) RIGHT TO POSSESSION OTHERWISE THAN BY THE ACT OF THE OWNER.—

(1) The founder of lost goods has a right to possession.

(2) It is not the result of the act of the owner.

(3) But it is good against all the world except the true owner.

II. Against whom can such a suit be maintained

1. A suit under Section 10 can be maintained against any one and can be maintained even against the true owner.

2. All that is necessary is that the Plaintiff must be entitled to possession.

Section 11. Moveable Property

1. Q. 1.—Who can maintain a suit under Section 11.

A.—The person entitled to *immediate possession.*

2. Q. 2.—Against whom can such a suit be maintained ?

A.—Against any person if he is not owner.

The Defendant must not be the owner. If he is, then Section 10 would apply.

3. Q. 3.—In what case will there be specific relief by way of recovery of possession ?

A.—(i) Where the person who holds the thing is the agent or trustee of the claimant.

(ii) Where compensation for money would not be adequate compensation to the claimant for the loss.

(iii) Where it is extermely difficult to ascertain actual damage caused by its loss.

(iv) Where the possession of the person is the result of a wrongful transfer from the claimant.

Specific Relief regarding Possession of Property

They are dealt with in Sections 8—11.

Section 8. Recovery of specific immovable property by a person entitled to the possession thereof.

Section 9. Recovery of posssession of specific immovable porperty by a person who is dispossessed.

Section 10. Recovery of possession of specific movable property by a person *entitled to its possession.* (1) By reason of ownership (2) By reason of temporary or special rights (Trustee) Bailment Pawn.

Section 11. Recovery of possession of Specific immovable property by a person who is entitled to its *immediate possession.*

This applies when the person having possession is not owner

What is meant by possession in Law ?

Legal possession is a compound of two ingredients: *Corpus and animus domini.*

Note:—

(i) Legal Possession does not involve the element of title or right. Legal Possession is wholly independent of right or title. Legal Possession may be *lawful* or *unlawful.*

If a possessor acquired his *de facto* possession by a means of acquisition recognized by the Law *(Justis fitulus)* he has a lawful possession ; if he did not so acquire it (as in the case of a thief) he has legal possession, but it is an unlawful one.

(ii) *Legal Possession* confers more than a personal right to be protected against wrong-doers : it confers a qualified *right* to possess, a right in the nature of property, which is valid against every one, who cannot show a prior and better title.

There are two elements in legal possession.

(i) Corpus, i.e. the physical relation.

(ii) Animus, i.e. the mental relation.

Corpus or physical relation does not mean physical contact only. It also includes physical contact resumable at pleasure.

The essence of corpus is the power, to exclude others from the use of a thing, i.e. an effective occupation or control according to the nature of the thing possessed.

Animus is the intention of exercising such power of dealing with a thing at pleasure and excluding others—*animus domini.*

Three forms of animus

The mental attitude of the physical possessor in regard to the object of his possession may assume three degrees.—

First.—His intention may be merely to protect the thing. There is no assertion of right—Servant's possession of masters goods.

Second.—Intention to control for certain limited purposes —e.g. tenant—intention to exclude every one except the owner.

Thirdly.—Intention amounting to a denial of the right of every other person—This is the real *animus domini.*

Distinction between Possession and Trespass

1. What the plaintiff is to prove in such cases is possession of the disputed property and not mere isolated acts of trespass over that property. He must prove—

(i) That he exercised acts which amounted to dominion, the nature of these acts of dominion varies with the nature of the property.

(ii) That the act of dominion was exclusive.

2. If the occupation of the plff., as indicated by those acts, has been peaceable and uninterrupted and has extended over a sufficient length of time, the inference may properly be drawn that the plaintiff was in possession.

Objects of Section 8 and *9.*

(i) Section 8 of the Act provides dial the person entitled to the possession of specific immovable property may recover it in the manner prescribed by the C. P. C, i.e., by a suit for ejectment on the *basis of title.*

(ii) Section 9 gives a summary remedy to a person, who has, without his consent been dispossessed of immovable property otherwise than *in due course of Law* for recovery of possession without *establishing title.*

Section 9.

This Section deals with the subject of unlawful dispossession, and gives to the person dispossessed the alternative of two remedies.—

(i) He may simply prove the fact of his unlawful dispossession, in a suit instituted by him within six months thereof, recover possession of the property. The question of his *title* to the property is quite immaterial.

(ii) He may recover possession by relying on his title in a suit brought by him for that purpose. Here his success depends upon his proof of title.

The former remedy is called remedy by way of a possessory suit and is enacted in Section 9. The latter is the ordinary remedy of a suit based on title and is embodied in Section 8.

Nature and object of Section 9.

(i) To prevent people from taking the law into their own hands, however good their title may be.

(ii) To prevent the shifting of the *burden of proof* owing to dispossession—Possession being *prima facie* evidence of title.

Anterior possession *per se* constitutes a perfect title to property as between the *dispossessed* and the *dispossessor,* in a suit under Section 9, i.e. within six months of the dispossession.

Question.—What is the effect of anterior possession in a suit for possession by a person, who is dispossessed after 6 months have elapsed and a suit under Section 9 is barred ?

The following propositions have been judicially established :—

(i) Possession for a period of sixty years and upwards is sufficient to create a title in the possessor which no one can question.—8 D.R. 386.

(ii) Adverse possession for 12 years under article 142 is itself title even against the rightful owner himself.

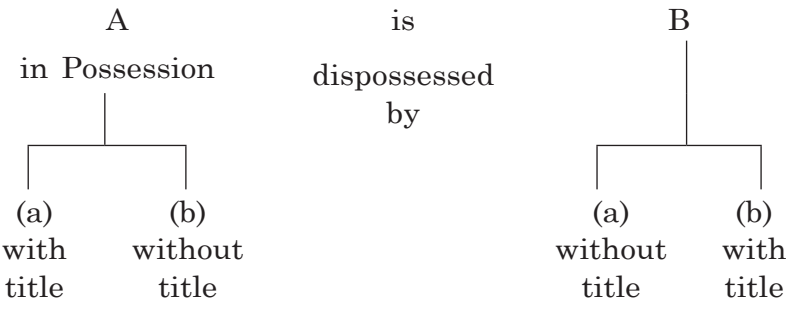
Consequently, where in a suit for possession, a plea of adverse possession during the prescribed period of limitation is set up by the Defdt. the question of limitation becomes a question of title, and the Piff. must furnish *prima facie* proof of subsisting title at the date of his suit, before the Defdt. is required to establish his adverse possession.

(iii) Prior possession, however short, is itself a title against a *mere wrong-doer* and a bare plea of anterior possession, and dispossession, is in fact a good ground for recovery of possession,

(1) Where the dispossessor can prove no title, or

(2) Where neither party can prove a title.

Statement of the Position



I. Suit brought within 6 months.—

(a) and (a) (b) and (b) (b) and (a)	A can recover possession under Section 9 irrespective of title.

II. In a suit brought after six months.—

(a) and (a)	A can recover, because the title is in A.
(b) and (b)	A cannot recover, because the title is in B.
(b) and (a)	A can recover, because of A's anterior possession.

Entitled to Possession

A right to possession exists either.—

(i) as a part of ownership or

(ii) independently of ownership, as a temporary or special right.

These special rights arise either.—

(i) by the act of the owner or,

(ii) otherwise than by the act of the owner.

I. By act of the owner

(1) Bailment and (2) Lien

Bailment is (1) simple and (2) special of Pawn and *Hire*

(i) *Simple Bailments* e.g. loan, custody, carriage and agency.

In simple Bailments, the Bailor has a *right to Possession* and the Bailee has legal possession.

A is Bailor and B is Bailee. Both can recover possession against C. A can recover possession as against B.

(ii) *Special Bailment*.— Pawn and Hire

Bailor has no right to possession during the continuance of the bailment and he only can recover possession.

Lien. Arises out of debt—the Vendor having the right to possession of the thing sold, until the purchaser has paid the purchase money.

II. Right to possession otherwise than by act of owner

Finder of lost goods—entitled to possession as against all the world except the owner.

PART II

DIVISION II

Performance of Contract

Specific Performance of a Contract is "its actual execution according to its stipulations and terms; and is contrasted with damages or compensation for the non-execution of the contract.

It is a species of Specific Relief, afforded by ordering a party to *do* the very act which he is under an obligation *ex-contractor* to do.

Specific Performance of a Contract

Sections 12 and 21 deal with Specific Performance of a Contract.

Section 21.—Defines contracts which *cannot* be specifically enforced.

Section 12.—Defines contracts which *may* be specifically enforced.

Section 21.—There are eight sorts of contracts which *are not* specifically enforceable.—

(i) Contracts	for the non-performance of which money compensation is an adequate relief.
(ii) Contracts	(i) running into minute details.
	(ii) dependent on personal qualifications or volition of parties.
	(iii) is such that Court cannot enforce Specific Performance of its material terms.
(iii) Contracts	the terms of which the Court cannot find with reasonable certainty—e.g. necessary appliances.
(iv) Contracts	which in its nature is revocable e.g. Partnership without duration.
(v) Contracts	by trustees in excess of their powers, or in breach of their trust.

(vi) Contracts by company in excess of its powers.

(vii) Contracts the performance of which involves the performance of a continuous duty extending over a longer period than 3 years from its date.

(viii) Contracts material part of the subject-matter supposed by both to exist has ceased to exist.

(ix) Contracts to refer a controversy to arbitration.

Note. Practically Specific Performance because no right of suit is given.

Specific Performance of Contracts

Section 12

1. There are four cases in which Specific Performance may be enforced.

(i) Where act promised is in performance of a trust.

(ii) Where there is no standard to ascertain actual damage.

(iii) Damages, no adequate relief.

(iv) Compensation for non-performance cannot be got.

Contract

The first question to be determined by the Court in a suit for Specific Performance of an agreement is, whether the agreement in question is a contract or not. Section 4 (a) — right to relief unless agreement is a contract.

The following agreements are not contracts because they are not enforceable and are therefore excluded:—

(i) Incomplete agreements—Parties not gone beyond the stage of negotiations;

(ii) Agreements which are void.

(iii) Contingent agreement—until the contingency has applied . . . should be "arisen".

Voidable contracts are not excluded.

There must always be a contract before the Court which has been unperformed.

Mutuality—The remedy by way of specific performance is *mutual,* i.e., the vendor may bring his action in all cases where the purchaser can be sure for specific performance.

This principle of mutuality applies both in the case of immoveables and moveable.

Doctrine of mutuality— This means, that at the time of making of the contract, there must have been consideration on both sides or promises mutually enforceable by the parties. Hence specific of performace of a gratuitous promise under Seal will not be granted nor can an infant enforce a contract by this remedy. His promise is not enforceable against himself and it is a general principle of Courts of equity to interfere, only where the remedy is mutual.

Section 13

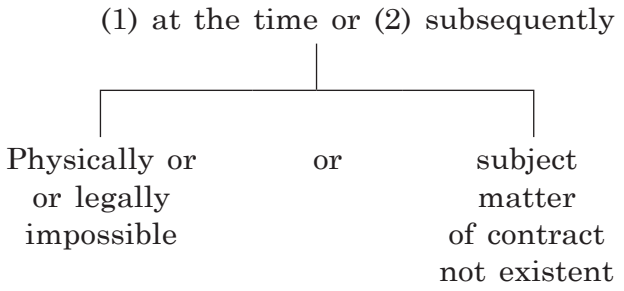
Specific performace of contract and impossibility of performance. *Section 56* of the Contract Act.

Section 56 clause 2 enacts a general rule. It lays down when a contract becomes void.

This rule covers every ground of impossibility and is based on the assumption, that there is, in all cases of contract, an implied condition that performance shall be possible.

Impossibility in relation to contract.

Impossibility



Subsequent Impossibility

Whether a party can be relieved upon discovery, subsequent impossibility depends upon—

(i) Whether the contract is conditional or unconditional.

(I) If unconditional— must perform

(II) If conditional—on three circumstances

(i) Continuing legality.

(ii) Conditional by express terms—

(iii) Conditional by implication—continued existence of the subject-matter of the thing in Sec. 56 Contract Act.—subsequent in possibility—the Contract is *void*.

might on two grounds.—

(i) The thing agreed to is physically or legally impossible.

(ii) The subject matter of the contract is non-existent.

Such Impossibility might be either.—

(i) *Initial* or *subsequent*.

If impossible, the contract is void and no question of Specific Performace arises whether the impossibility is initial or subsequent.

Section 13 of the Specific Relief Act establishes an exception to Section 56 of the Contract Act in respect of one species of impossibility i.e. *impossibility by reason of non-existence of the subject-matter*.

Section 13 says that Specific Performance of a contract may be enforced even though the subject-matter is partly destroyed.

Sale of a house—Destruction by cyclone—purchaser may be compelled to perform.

Section 13 enacts an exception

It deals with the case where a *portion* of the subject matter ceases to exist.

The rule shortly expressed.—

Because A, owing to special inevitable circumstances, is unable to perform his promise, it is no reason why B should not perform his, especially as he might have protected himself by making the performance of his promise conditional upon performance by A. Having made an unqualified promise he must stand by it.

Specific Performance of a Part of a Contract

Can the Court decree the peformance of a part of the contract? This question is dealt with in Section 14-17.

Section 17 enacts a general rule. It lays that the Court will not, as a general rule, compel specific performance of a Contract, unless it can execute the whole contract. Specific performance must be of the whole or nothing.

Sections 14, 15, 16 form exceptions to the rule.

Exceptions : The promises undertaken—may be divisible or indivisible.

I. *Divisible promises* i.e. promises—one part stands on a separate and independent footing from another part. If the former can and might be specifically performed it will be so enforced, although the latter cannot or ought not to be specifically enforced—Section 16.

II. *Indivisible promisers.*—The part which cannot be performed may—

(i) Admit of compensation by money or,

(ii) It may not.

(A) Admits of compensation—Two cases

It may bear—

(i) A small proportion to the whole undertaking,

(ii) A large proportion to the whole undertaking.

If—(i) it bears *a small proportion,* then a party sue for specific performance of either part and for damages for non-performance of the balance—Section 14.

If—(ii) it bears *a large proportion,* then the promise may sue for Specific Performance of the remaining part, if he relinquishes all claim to further performance and all right to damages.

(B) Part which cannot be performed, does not admit of compensation

Then the promisee may sue for Specific Performance of the remaining part, if he relinquishes all claim to further performance and all right to damages— Section 15.

Illustration

A contracts to sell to B an estate with a house and garden for 1 lakh. The garden is important for the enjoyment of the house. It turns out that A is unable to convey the garden.

Can B obtain specific performance to the contract ?—Yes, if B is willing to pay the price agreed upon and to take the estate and house without garden, waiving all rights to compensation either for the deficiency or for loss sustained by him through A's neglect or default.

There are *thus* four exceptions to the rule.

1. Where parts are divisible—Specific Performance can be decreed of one part though not of all parts—Section 16.

2. Where parts being in divisible part which *cannot* be performed admits of compensation and bears a small proportion to the whole, the party may sue for Specific Performance—Section 14.

3. Where parts being indivisible, part which *cannot* be performed admits of compensation and bears a large proportion to the whole undertaking, the promisee may sue for Specific Performance of the remaining i.e. of the part which can be performed provided he relinquishes all claim to further performance and all right to damages—Section 15.

4. Where parts being indivisible, the part which cannot be performed does not admit of compensation and bears a large Specific Performance of the part which can be performed may be decreed within the terms mentioned in Section 15.

Specific Performance of a Contract

Where the Vendor or Lessor has an

Imperfect Title

1. The rule as to this is contained in Section 18. This Section deals with four clauses:—

(i) Where Vendor/Lessor has acquired good title *after* the contract.

(ii) Where procuring of the consent of other persons is necessary.

(iii) Where encumbered property is sold as though it was unencumbered.

(iv) Where *deposit* has been paid and the suit for Specific Performance has been dismissed.

Clause (a).—Is based on the undeniable proposition that when a person enters into a contract without the power of performing that contract, and subsequently acquires the power of performing that contract, he is bound to do so.

Illus. An heir apparent, who contracts to sell the property to which he is heir, will be compelled to specifically perform such contract if and when he succeeds to the property.

Whatever interest the seller acquires in the property subsequently to the contract, he will be compelled to convey to the purchaser.

Clause (b).—Is based upon the proposition that where the validity of a contract is dependent upon the concurrence of a stranger to the contract, and the stranger to the contract is bound to convey at the request of the Vendor or lessor, the Vendee and the lessee can compel him to obtain such concurrence.

Clause (c).—Is based upon the proposition that where the property sold or leased is represented as being free from encumbrance but is *encumbered*, the Vendor shall be compelled to free it from encumbrance sale of property which is mortgaged—Provided the price is not above the mortgage money.

Clause (d).—Clauses (a), (b) and (c) cover cases where the purchaser or lessee is the plaintiff suing for perfection of title.

Clause (d) covers a case where the suit is brought by the Vendor or lessor for Specific Performance and it fails because of his not being able to perfect the title.

In such a case the Court cannot only dismiss the suit with costs, but proceeds to award to the defendant purchaser a special relief *viz*—the return of his deposit with interest and his cost and a lien for all these on the property agreed to be sold or let.

General Rule regarding deposit.—Deposit is paid as a guarantee for the performance of the contract and where the contract fails by reason of the default of the purchaser, the vendor is entitled to retain the deposit.

Rights of Parties to a Contract to sue for Specific Performance

Four cases to be considered:—

I. For whom contracts may be specifically enforced.

II. For whom contracts cannot be specifically enforced.

III. Against whom contracts may be specifically enforced.

IV. Against whom contracts cannot be specifically enforced.

I. For whom contracts may be specifically enforced.

Section 23 deals with the question Who may obtain *Specific Performance ?*

Clause (a) any party thereto.

Clause (b) (i) an assignee from a promisee.

(ii) Legal representative of a promisee after his death.

(iii) an undisclosed principal of a promisee.

Each of these may obtain Specific Performance of a contract in which he is interested, but each is subject to the proviso that the contract must not be a personal one, nor must the contract prohibit the assignment of the interest of the Promisee.

(c) Persons entitled to the benefit of a marriage contract or compromise of doubtful rights between members of the same family.

(d) Remainder man on a contract made by a tenant for life.

(e) Reversioner in possession.

(f) Reversioner in remainder.

(g) New company on amalgamation.

(h) Company on a contract made by the promoters.

Cases where contract cannot be specifically enforced except by varying it—Sec. 76.

(1) By mistake or fraud the contract is in terms different from that which the Deft, supposed it to be.

(2) Deft, entered into contract under a reasonable misapprehension as to its effect between Deft, and Plff.

(3) Enters into a contract relying upon some misrepresentation by the Plff.

(4) Where the object is to produce a certain result which the contract fails to produce.

(5) Where Parties have agreed to vary it.

Comment.

Sections 91, 92. Evidence Act.— A plff. cannot give oral evidence to make out a variation. It does not debar a deft, from showing that by reason of fraud or misrepresentation, the writing does not contain the whole contract; he can under provision 1 to S. 92 give oral evidence to prove that there is variation.

Plff. in that case cannot have a decree unless he submits to the variation; the Plff. is put on his election either (1) to have his action for Specific Performance dismissed or (2) have it subject to variation. If he elects not to accept the variation, he does not lose his remedy of damages.

II. Persons for whom contracts *cannot* be specifically enforced. This is dealt with in Sections 24 and 25.

Section 24

(i) Who could not recover compensation for its breach.

(ii) Who has become incapable of performing or voilates any essential term of the contract.

(iii) Who has already chosen his remedy and obtain satisfaction for the alleged breach.

(iv) Who, previously to the contract had notice that a settlement had been made and was in force.

This Section is distinguishable from Section 23 in that the defence to Specific Performance is not founded on anything *in the contract itself* but is based solely upon the *acts* or *conduct* of the Plff.

Section 24 is a general Section. While Section 25 is a Section which is a particular one and is limited in its application to two kinds of contracts only:—

(i) Contract to sale and (ii) Contract to let property whether movable and immovable,

Sec. 25 says that such a contract cannot be specifically enforced in favour a Vendor or Lessor, i. e. in the following cases:—

(i) Knowing not to have any title to the property, has contracted to sell or let the same.

(ii) Who cannot give a title free from reasonable doubt at the date fixed by parties or Court.

(iii) Who, previous to entering into the Contract has made a settlement of the subject-matter of the contract.

Settlement is defined in Section 3 and means any instrument—where by the destination or devolution. Successive interests in movable and immovable property is disposed of or is agreed to be disposed of.

III. Persons against whom contract may be enforced

Section 27.

(i) Either party.

(ii) Any other person claiming under a party by a title arising subsequently to the Contract, [except a transferee for value without notice].

(iii) Any person claiming under a title which prior to the contract voidable and known to the plantiff, and might have been displaced by the defendant.

(iv) New company after amalgamation.

(v) Company in respect of the contract made by promoters.

IV. Against whom contract cannot be enforced

Section 28.

(i) Where consideration is grossly inadequate as to be evidence of fraud.

(ii) Where assent is obtained through misrepresentation; unfair practice or other promise not fulfilled.

(iii) Where assent is given under the influence of mistake of fact, misapprehension or surprize.

Specific Performance and Discretion of the Court

In granting Specific Relief, the important point is—When is the Court bound to grant Specific Performance Relief? Obviously the Court cannot grant Specific Performance Relief in cases where the law provides that no Specific Performance Relief shall be granted. Such cases fall under three classes:

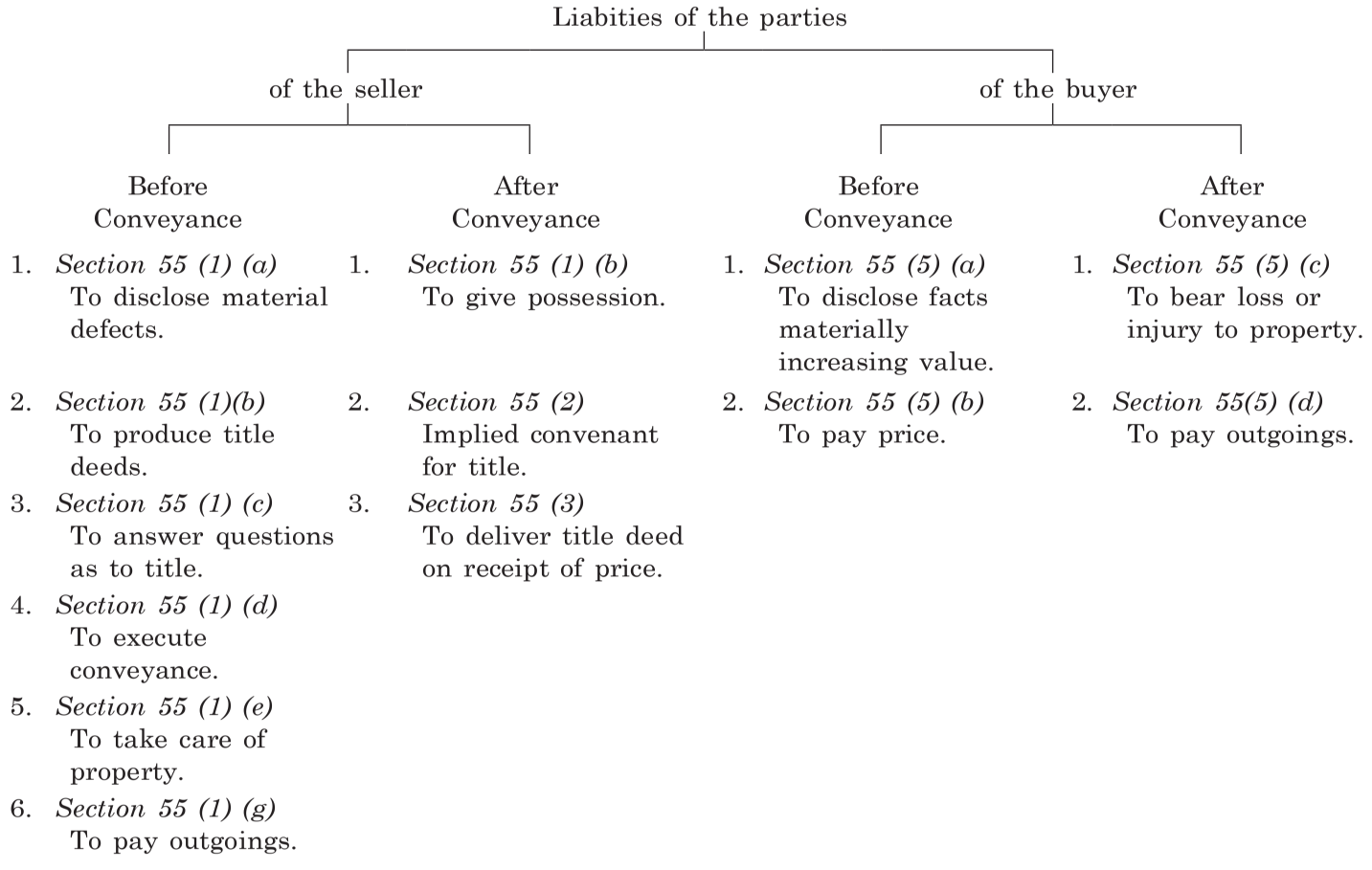
(i) Where the nature of the contract is such that law does not allow it to be specifically enforced.

(ii) Where the Plff. is a person in whose favour a contract cannot be specifically enforced.

(iii) Where the Deft. is a person against whom a contract cannot be specifically enforced.

There remain the following three cases in which a contract can be specifically enforced:—

(i) Where the contract is of such a *(further pages not found—ed.)*


Liabities of the parties
of the seller
of the buyer
Before Conveyance
After Conveyance
Before Conveyance
After Conveyance
1. Section 55 (1) (a) To disclose material defects.
2. Section 55 (1)(b) To produce title deeds.
3. Section 55 (1) (c) To answer questions as to title.
4. Section 55 (1) (d) To execute conveyance.
5. Section 55 (1) (e) To take care of property.
6. Section 55 (1) (g) To pay outgoings.
1. Section 55 (1) (b) To give possession.
2. Section 55 (2) Implied convenant for title.
3. Section 55 (3) To deliver title deed on receipt of price.
1. Section 55 (5) (a) To disclose facts materially increasing value.
2. Section 55 (5) (b) To pay price.
1. Section 55 (5) (c) To bear loss or injury to property.
2. Section 55(5) (d) To pay outgoings.

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Rights of the Parties

- of the Seller
  - Before Conveyance
    1. *Section 55 (4) (a)* To take rents and Profits.
  - After Conveyance
    1. *Section 55 (4) (b)* To claim charge for price not paid.
- of the Buyer
  - Before Conveyance
    1. *Section 55 (6) (b)* To claim charge for price prepaid.
  - After Conveyance
    1. *Section 55 (6) (a)* To claim benefit of increment to property.

Uberrima fides= (most abundant faith)

Contracts said to require *uberrima fides* are those between persons in a particular relationship, as

(i) Guardian and ward.

(ii) Attorney and client.

(iii) Physician and patient.

(iv) Confessor and penitent.

Complete disclosure necessary.

●●

Liabilities of the Parties

A. Liabilities of the Seller

I. Before Conveyance

1. Section 55 (1) (a)—To disclose material defects.

(1) A contract for the sale of land is not a contract *uberrimal* fidei: The duty of disclosure is not absolute. *The duty to disclose is an obligation to disclose latent defects.*

(2) A latent defect is a defect which the buyer could not with ordinary care discover for himself. There is no duty to disclose defects of which the buyer has actual or constructive notice.

(3) As to patent defects of which the seller is unaware, the maxim *caveat emptor* applies. But a mutual mistake as to a matter of fact essential to the agreement will render the agreement void.

(4) *A latent defect whether of property or of title must be material.* A defect to be material must be of such a nature that it might be reasonably supposed that if the buyer had been aware of it, he might not have entered into the contract at all, for he would be getting something different from what he contracted to buy.

(5) Whether a defect is material or not must depend upon the circumstances of each case. When land was sold for building purposes, an underground drain was held to be a material defect, but not when a house or land were sold mainly for residence.

(6) Defects may be Defects in property or Defects in tide.

2. Section 55 (1) (B)—Production of Title deeds

(1) The obligation is to produce title-deeds for inspection and not for delivery.

(2) The documents of title required to be produced for inspection are not only documents which are in the possession of the seller, but also includes documents which are in his power to produce.

(3) There is no obligation *to produce* title deeds unless the buyer makes a requisition.

(4) The Buyer however must not omit to take inspection, otherwise he will be held to have constructive notice of matters which he would have discovered if he had investigated the title.

3. Section 55 (1) (c)—Sellers duty to answer questions

(i) When the documents of title are produced, the buyer examines them and if he is not satisfied makes requisitions. These requisitions are.—

(i) Requisitions relating to title.

(ii) Requisitions relating to Conveyance.

(iii) Other enquiries.

(2) Requisitions on title are objections that the documents do not show the agreed title or that the documents are not efficacious i.e. not duly attested.

(3) Requisitions on matters relating to conveyance refer to such matters as the joinder or concurrence of parties to the conveyance.

(4) Inquiries are for the protection of the buyer, and call attention to possible omissions of disclosure by the seller, and seek information on such points as easements, party walls and insurance.

(5) The Seller is bound to answer all requisitions which are relevant to the title and which are specific.

(6) The duty to answer requisitions is altogether distinct from the duty of disclosure under Section 55 (1) (a) of a defect, for, the omission of the buyer to make a requisition will not absolve the seller if he has not made a full disclosure.

(7) A buyer may waive requisitions. Waiver may be express or may be implied.

(8) Waiver is implied from conduct.

(i) When a buyer does not press a requisition that has been made.

(ii) When a buyer asks for time to pay the price.

(iii) When a buyer enters into possession.

(iv) When a buyer pays the whole or part of the price.

4. SECTION 55 (1) (D)—EXECUTION OF CONVEYANCE

(1) The execution may be to the purchaser or to such person as the purchaser shall direct. Consequently, on a resale by the buyer before conveyance, the conveyance may be direct to the sub-purchaser. The seller may require the original buyer to be a party to the Conveyance if there is a difference of price but not otherwise.

(2) It is the duty of the buyer to tender to the seller a proper draft—*31 Cal. L.J. 87.*

(3) This duty of the buyer is subject to a contract to the contrary.

(4) The execution of the conveyance and the payment of price are reciprocal duties to be performed simultaneously. They are concurrent promises. If either party sues for specific performance, he must show that he was ready and willing to perform his part.

(5) Proper time for execution:—

(i) The section is silent as to what is proper time.

(ii) The time is usually settled by the contract of sale.

(iii) If time is fixed, and an unreasonable delay occurs, the proper course is to give notice making time the essence of the contract.

(iv) If time is not settled, the proper time is the date when the seller makes out his title.

(6) Proper place for execution:—

(i) The Section is silent.

(ii) Since it is the buyer who has to tender the draft conveyance to the seller, the proper place for execution would be the Seller's residence or his Solicitor's office.

(7) Cost of Conveyance :—

(i) The Section is silent.

(ii) This is usually settled by the terms of the contract.

(iii) In the absence of any express term, the buyer has to pay the cost of the Stamp—Section 29 (c) Indian Stamp Act.

5. SECTION 55 (1) (E)—CARE OF PROPERTY

(1) The contract of sale does not give to the buyer any interest in property. But it imposes upon the seller a personal obligation to take care of the property.

(2) The seller must also take care of the title deeds. The loss of title deeds depreciates the value of the property and damage done to the estate.

(3) To take care means to do what a prudent owner ought to and keep the property in reasonable repair and protect it from injury by trespassers.

(4) The obligation to take care is one collateral to the contract and does not merge in the conveyance. The duty to take care continues even after completion of the sale and the buyer is not responsible for any loss caused by the seller. If the seller neglects his duty, the buyer is entitled to compensation to be deducted from the purchase money; after the completion the buyer may recover damages.

6. Section 55 (1) (G)—Meet outgoings

(1) It is the duty of the seller to pay what are called under English Law outgoings. In India they include—

(i) Public Charges

(ii) Rent

(iii) Interest

(iv) Incumbrances.

(i) Public charges over

(i) Government Revenue.

(ii) Municipal Taxes.

(iii) Payment charged upon land by Statute either expressly or impliedly by reason of their being recoverable by distress or other process against the land.

(ii) Rent—The payment of rent is a question which arises when the property sold is leasehold property. The seller of the leasehold property is bound to pay rents accruing due up to the date of the sale.

(iii) Interest.

(5) *Incumbrance*—

(i) Incumbrance means—a claim, lien, or liability attached to the property.

(ii) The seller's duty is to discharge all incumbrances. It is immaterial that the buyer was aware of the incumbrances when he contracted to buy.

(iii) The sale is not subject to incumbrances, unless there is an express provision to that effect.

(iv) If the incumbrance is a common charge on the property sold and other properties of the seller, the buyer may insist on its being discharged out of the other property.

(6) This liability imposed upon the seller is collateral to the contract and may be enforced even after conveyance.

Seller's Liabilities

II. After conveyance

1. Section 55(1)(b)—To give possession

1. It is the duty of the seller to give possession after conveyance and not to leave the buyer to get possession for himself.

2. This liability may be enforced by a suit for Specific Performance.

3. Time for giving possession—

(i) The Section docs not say when the seller should give possession.

(ii) Reference to Section 55 (4) (a) shows that possession be given when ownership passes to the buyer. This would be at the time of the execution of the sale-deed—*6 Lah. 308*.

(iii) The seller cannot refuse possession because price has not been paid unless there was intention to the contrary.

(iv) The buyer's right to possession and the seller's right to unpaid price may be enforced in the same suit.

4. Nature of Possession—

(i) Possession docs not mean actual occupation.

(ii) Physical possession in the case of tangible and symbolical possession in the case of intangible property is enough.

(iii) Symbolical possession is enough in the case of property which is in the possession of tenants or mortgagees.

2. Section 55 (2)—To assure that the interest subsists.

1. There are two views as to whether this liability of the seller is one which arises before conveyance or after conveyance.

(i) *Calcutta view*. This clause contemplates a *completed contract* and corresponds to covenant for title in an English conveyance.

57 Cal. 1189.

(ii) *Madras view*. This clause contemplates cases, where the transaction has not progressed beyond the stage of contract. *40 Mad. 338(350):*

38 Mad. 1171.

(iii) *Lahore view*. Follows Madras.

6 Lah. 308.

(iv) *Bombay view*. It pertains to liability *after conveyance*

18 Bom. S. R. 292: 52 Bom. 883: 31 Bom. LR. 658.

(a) The provisions of Section 55 (1) enable the buyer before completion, to ascertain if the title offered is free from reasonable doubt. Once he has accepted the conveyance and the sale is completed, he has no remedy on the contract except for fraud.

(b) The covenant for title implied by Section 55 (2) gives the buyer a further remedy in case of defects discovered after conveyance.

(v) Another view which probably is the correct view.

(a) In the matter of Title, the liability of the seller is twofold.

(i) He must pass to the buyer a title free from reasonable doubt.

(ii) He must pass to the buyer a title which he professes to pass and nothing less. He must make good his representation.

Under (i) he must prove that he has acquired his title in any one of the recognized ways: such as prescription, possession, inheritance, purchase, etc.

Under (ii) if he professes to transfer a full proprietory interest, then interest transferred must be full proprietory interest and not merely occupancy interest: Sale of free from incumbrances land which is subject to incumbrance : Sale of non-transferable land as transferable.

(b) Section 55 (1) relates to liability for a title free from reasonable doubt: Section 55 (2) relates to liability for passing title which he professed to pass.

2. Section 55 (2) relates to misrepresentation or misdescription as to title. A distinction must be made between misdescription of title and misdescription of property.

(i) Misdescription of title is a breach of the covenant for title under Section 55 (2) and gives right to damages.

(ii) Covenant for title does, not extend to misdescription of property i.e. as to the extent of the land sold.

(iii) A covenant for title is not a covenant that the land purported to be conveyed is of the extent stated in the sale-deed. It is merely a contract with the purchaser of the validity of the sellers' title. Consequently if the purchaser finds a deficiency in area his, suit must be based not on the covenant for title, but for part failure of consideration.

3. Express covenant for title. Every conveyancer has an implied covenant for title. But parties may enter into an express covenant relating to title. The points to be noted in regard to an express covenant are:

(a) If overrides and does away with the effect of all implied covenants.

(b) Although an express covenant alone can govern the rights of the parties, yet an implied covenant cannot be got rid of except by *clear* and *unambiguous* expression.

4. *Who can claim the benefit of the covenant:* The benefit of a covenant for title can be enjoyed not only by the purchaser and his representatives, but also subsequent alienees, who claim under the purchaser, can enforce it as against the seller.

5. Under this clause the vendor is presumed to guarantee his title absolutely to the property. If he wishes to contact himself out of the covenant he must do so expressly or by necessary implication.

6. The implied covenant for title has nothing to do with the question, whether the buyer has or has not notice of the defect of title and the buyer's knowledge of the defect does not deprive him of the right to sue for damages and can claim a return of the purchase-money if he is dispossessed by reason of a defect in title.

7. *Covenant for title—what does it include.* The covenants for title implied in an English conveyance, include.—

(i) Right to convey,

(ii) Right to quiet enjoyment,

(iii) Right to hold free from incumbrances,

(iv) Right to further assurance.

Under the covenant for further assurance, the seller is bound to do such further acts for perfecting the buyer's title as the latter may reasonably require. Thus, if a seller has, after the sale perfected an imperfect title by the purchase of an outstanding interest, he can under this covenant, be compelled to convey it to the buyer.

(2) The English covenants are more extensive as they include the covenant for quiet enjoyment, for freedom from incumbrances and for further assurance. Under Indian Law they are not included.

8. Covenant for title is a covenant for a title free from reasonable doubt. It has been held by the Privy Council that an absolute warranty of title cannot be insisted upon by the purchaser. *9 I. A. 700 (713).*

9. The implied covenant for title does not apply in the case of a trustee :

(i) A trustee is only deemed to covenant that he has done no act whereby the property is incumbered, or that whereby he is hindered from transferring.

(ii) If a trustee conveys without disclosing his fiduciary character, he could no doubt be required to convey "as beneficial owner" so as to become subject to the usual covenants for title.

10. The implied covenant for title does not apply in the case of a guardian selling on behalf of the minor.

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4. THE LAW OF TRUST

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OUTLINE

PART I. What is a Trust and to what the Act applies ?

PART II. Express or Declared Trusts—

(i) Creation,

(ii) Extinction.

PART III. The Administration of a Trust.

PART IV. Constructive Trusts.

PART V. The Administration of a Constructive Trust.

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PART I

What is a Trust and to what the Act applies ?

II. To what kinds of Trusts the Act applies ?

1. Section 1 says in what cases the Act shall not apply. They are:

(i) Wakfs created by a Mohammedan.

(ii) Mutual relations of the members of an undivided family as determined by any customary or personal law.

(iii) Trusts to distribute prizes taken in war among the captors.

(iv) Public or Private religious or Charitable Endowments.

2. Explanations.

I. Wakf.—Permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman Law as religious, pious or charitable.

Two classes of Wakfs—

(i) Where benefit is reserved to the settlor and his family— Act VI of 1913 applies.

(ii) Where no benefit is reserved—Act 42 of 1923 applies.

II. Mutual relations of members of an undivided family.

Illus.—

1. The manager of a joint Hindu family and other members of the family.

2. A Hindu widow and a reversioner.

Their relations are not governed by the Trust Act. They are governed by customary law or personal law.

III. Distribution of Prizes taken in war.

1. *Prize.*—A term applied to a ship or goods captured *jure belli* by the maritime force of a belligerent at sea or seized in port.

2. All prizes taken in war vest in the sovereign, and are commonly by the royal warrant granted to trustees upon trust to distribute in a prescribed manner amongst the captors.

3. To such a trust created for the purpose of distributing prizes the Trust Act does not apply.

IV. PUBLIC TRUSTS AND PRIVATE, RELIGIOUS OR CHARITABLE ENDOWMENTS.

Trusts are either *Public* or *Private Trusts.*

I. *Public Trusts.*—A trust is a Public Trust when it is constituted for the benefit either of the public at large or some considerable portion of it answering a particular description. A Public Trust is for an unascertained body of people though capable of ascertainment.

II. *Private Trust.*—A Private Trust is a trust created only for the benefit of certain individuals who must be ascertained or ascertainable within a limited time.

III. *The Purposes of a Public Trust.*—They fall under three heads:—

(i) Public purposes.

(ii) Charitable purposes.

(iii) Religious purposes.

(1) The phrase public purposes is used in two senses :

(a) In its ordinary sense—it includes purposes. Such as mending or repairing of roads, a parish supplying water for the inhabitants of a parish, making or repairing of bridges over any stream or culvert that may be required in a parish.

(2) The Phrase Charitable Purposes—includes almsgiving, building alms-houses, founding hospitals and the like.

(3) The Phrase Religious Purpose—includes relating to religious teaching or worship—purchase or distribution of religious books, upkeep of Churches, Temples, etc.

If a Trust is a Public Trust—The Trust Act does not apply.

If a Trust is a Private Trust—Does the Trust Act apply ?

The Act applies only if the Private Trust is a trust which is not a Charitable or Religious Trust.

What is the Law that applies to a Public Trust or a Private Trust which is Charitable and Religious ? There are various enactments which apply.

1. Section 92, C. P. C.

2. The Religious Endowments Act, 1863.

3. The Religious Society's Act I of 1880.

4. The Official Trustee Act II of 1913.

5. The Charitable Endowments Act VI of 1890.

6. The Charitable and Religious Trusts Act XIV of 1920.

Different kinds of Trusts

1. Trusts fall into different classes. The class into which a trust falls depends upon the point of view a trust is looked at—

2. A trust can be looked at from three points of view—

(i) From the point of view of the mode in which a trust is created.

(ii) From the point of view of the constitution of the trust.

(iii) From the point of view of the nature of the duty imposed on the trustee.

3. From the point of view of the mode in which a trust is created trusts fall into two divisions (i) Express and (ii) Constructive.

4. From the point of the constitution of a trust, trusts fall into two divisions (i) completely constituted trusts and (ii) incompletely constituted trust.

5. From the point of view of the nature of the duty imposed on the trustee trusts fall into two divisions (i) Simple Trusts and (ii) Special Trusts.

I. Express and Constructive Trust

1. A trust can arise in two ways—

(i) It is the result of a voluntary declaration made by an individual,

(ii) It may be the result of a rule of law.

2. When a trust is the result of a voluntary declaration it is called an Express Trust or Declared Trust. When a trust is the result of a rule of law it is called a Constructive Trust.

3. The term Constructive Trust is used in another sense. In this sense it is used to signify a trust which is the result of a construction put upon the deed. A trust is a matter of intention. Intention may be declared in specific terms or it may be found by the Court to have been indicated by the party on a proper construction of the deed. In the latter case the trust is sometime called a Constructive Trust.

4. Two things have to be remembered in connection with a constructive trust used in this sense.

(i) Such a Constructive Trust is some times contrasted with an Express Trust. This is quite wrong. Such a Constructive Trust is really an Express Trust and is not to be contrasted with it. A trust is none the less an Express Trust because the language used by the settlor is ambiguous or clumsy, if, on the true construction of that language the Court comes to the conclusion that a trust must have been *intended*.

(ii) A trust which is constructive in the sense that the intention is deduced by constructing the document must not be confused with a Constructive Trust which is the result of the operation of the law. In the former there is an intention to create a trust and in that sense it is the result of the voluntary act of the party. In the latter there is no intention to create a trust. It is the creation of law and not of an act of the party.

Constructive Trusts fall into two sub-divisions :—

(i) Resulting Trusts.

(ii) Non-Resulting Trusts.

The difference between the two will be considered later when dealing with Constructive Trusts. They have one thing in common—they are both the result of the opperation of law and not the result of an act of party.

II. Completely Constituted Trusts and Incompletely Constituted Trusts.

1. A trust is said to be completely constituted when the trust property is *vested* in the Trustees for the benefit of the beneficiaries. When there is a mere declaration of a trust but the property is not vested in the Trustee the trust is incompletely constituted.

2. The question whether a trust is completely constituted or not is of the *utmost* importance where no valuable consideration is given for its creation.

3. *If value is given* it is immaterial whether the trust is perfect or not, for as equity looks on that as done which has been agreed to be done an imperfect conveyance for value will be treated a contract to convey and the Court will see that it is perfected.

4. *If no value is given* there is no equity and the Court will not grant any assistance to a person seeking to enforce.

5. If there is a complete transfer of property although it is voluntary yet the legal conveyance being effectually made the trust will be enforced by the Court.

6. There are two ways in which a trust may be completely constituted:

(i) The settlor may convey the property to the trustees.

(ii) The settlor may declare himself to be a trustee of it.

7. *Distinction between complete and incomplete trust*—

(i) A completely constituted trust is one in which the trust property has been finally and completely vested in the trustees.

(ii) A trust is incompletely constituted when the trust property has not been finally and completely vested in the trustees.

NOTE.—All trusts arising under wills are completely constituted, though may be either executed or executory—

(iii) A sellor must take all due steps to do all that it is his duty to *vest* the property in the trustee, and the instrument of conveyance must also contain a declaration of trust, if the settlor's intention is to escape defeat.

8. *Consequences arising from this difference*—

(i) An incomplete trust will be enforced if it is for valuable consideration. It will not be enforced if it is voluntary, i.e., without valuable consideration.

(ii) Valuable consideration in the law of trust, as in the law of contract, is some valuable thing assessable in terms of money, with the proviso that marriage, and also forbearance to sue is so considered.

(iii) A distinction exists between valuable consideration and good consideration. The phrase good consideration is applied to natural love and affection. Such a consideration though good is not valuable.

(iv) A good consideration does not make an incompletely constituted trust enforceable at the instance of a volunteer. It serves to rebut a resulting trust.

(v) *How far marriage is a consideration :*

(i) If the settlement is made *before* and in consideration of marriage, it is made for valuable consideration. So it is also, if made after marriage, but in fulfilment of an ante-nuptial agreement to settle.

(ii) But if the settlement is made after marriage, and not in pursuance of an ante-nuptial agreement, it is voluntary.

(VI) *Who are within the marriage consideration :*

(i) The only persons within the marriage consideration are the actual parties, the husband and the wife, and the issue of that marriage.

(ii) All other persons are volunteers and cannot enforce the provisions of a settlement *as against the settlor* so far as the transfer of property is still incomplete, e.g., an agreement to settle after—acquired property.

9. *Does the Indian Trust Act recognize this distinction between complete trust and incomplete trust—*

Simple and Special Trusts

1. A Simple Trust is a trust in which a trustee is a mere passive custodian of the trust property, with no active duties to perform.

2. A Special Trust is a trust in which a trustee is appointed to carry out some scheme particularly pointed out by the settlor and is called upon to exert himself actively in the execution of the settlor's intention.

3. A Simple Trust is spoken of as a passive trust and Special Trust is spoken of as an active trust.

4. Where a Simple Trust exists, the beneficiary, provided that he is *sue juris* and absolutely entitled, has a right to be put into actual possession of the property and he enjoys the further right of compelling the trustees to dispose of the legal estate in accordance with the beneficiary's instruction.

5. Special Trusts are divided into—(i) Ministerial and (ii) Discretionary.

6. In both the trustees have positive duties to perform.

7. The point of distinction is that in a Ministerial Trust the duties are such that the trustee is not called upon to exercise *prudence* while in a discretionary trust a trustee is required to exercise *prudence.*

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PART II

EXPRESS OR DECLARED TRUST

CHAPTER I.	Two kinds of Declared Trusts—
	(i) Executed.
	(ii) Executory.
CHAPTER II.	The Creation of an Express Trust.
CHAPTER III.	The Revocation of an Express Trust.
	Declared
CHAPTER IV.	The Extinction of an Express Trust.

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CHAPTER I

Two kinds of Declared Trusts

Executed and Executory

An Express Trust is either an *Executed Trust* or is an *Executory Trust*.

I. Executed and Executory Trusts

1. The expressions Executed and Executory as used in relation to contract have not the same meaning which they have when used in relation to trust.

2. When used in relation to a contract they refer to the carrying out of the contract. When used in relation to a trust they refer to the creation of a trust as distinguished from its carrying out.

3. In the sense in which the term is used in contract every trust is executory until it is over. But that is not the meaning in which the word is used in relation to trust.

4. When the words *Executed* and *Executory* are used in connection with a trust they have different meaning.

(1) A trust is an *Executed* Trust when the author of the trust has not only designated the persons who are to benefit by the trust but has also indicated the *interests* which they are to take in the trust property.

(2) A trust is said to be an Executory Trust when the author of the trust has only designated the persons who are to benefit by the trust but has not indicated the interests which they are to take in the trust property but has left it to be defined by another person by another instrument.

Illus.—On the marriage of *A* and *B* it is agreed between them that certain property shall be settled on trust for them and for their children.

Note.—Here the parties who are to benefit by the trust are defined—They are *A* and *B* and their children—

(1) But what benefits *A* and *B* their children are to take is not defined.

(2) Therefore, it is an Executory Trust.

(3) The line of cleavage between an Executed Trust and an Executory Trust is different from the line of cleavage between a completely constituted trust and an incompletely constituted trust.

(4) The line of cleavage between a completely constituted trust and an incompletely constituted trust is :- in the former the property is vested in the Trustees upon trust; in the latter the property is not so vested.

(5) The line of cleavage between an Executed Trust and an Executory Trust is that in the former the interests of the beneficiaries are defined when in the latter they are not so defined.

(6) That being so an Executory Trust may be a completely constituted Trust.

II. PARTIES TO A TRUST.

1. Apparently there are three parties to the transaction of a trust—

(i) The party who makes the trust.

(ii) The party who accepts the trust.

(iii) The party for whose benefit the trust is made.

2. The party who makes the trust is called "the author of the trust". The party who accepts the trust is called the trustee. The party for whose benefit the *trust* is made by the author and accepted by the trustee is called the beneficiary.

3. Is it necessary that the three parties *should* be distinct and separate and that one of three cannot occupy the role of any two of them ? The answer to this question is *some* of them can play the role of two.

(i) The author of the trust and the beneficiary of the trust must be distinct and separate.

(ii) The trustee and the bebeficiary must be distinct and separate.

(iii) The author of the trust need not be distinct and separate from the Trustee..

4. The reasons why some parties can occupy the role of two in one and some cannot are important.

(i) The making of a trust results in the creation of two different estates in the property which is the subject-matter of the trust—the legal and the equitable. A trust lasts as long as these two interests remain separate, (ii) If the legal and equitable estates happen to meet in the same person, the equitable is forever extinguished by being absorbed in the legal. In other words, where the legal and the equitable interests are co-extensive and

vested in the same person the equitable merges in the legal interests which means that the trust comes to an end.

There are two principles to be borne in mind

(i) There is no trust if it does not create a separate equitable interest.

(ii) There is no trust if the separate legal and equitable interest become merged.

5. Applying these two principles we reach the following conclusion—

(i) There is no merger when the author of the Trust and the trustee are the same. Therefore, they need not be distinct.

(ii) There is no creation of a separate equitable estate when the author of the Trust and the beneficiary are the same. Therefore, they must be distinct.

(iii) There is merger when the trustee and the beneficiary are the same. Therefore, they must be distinct.

To sum up. The author of the trust and the trustee may be one and the same person. But the beneficiary must always be a distinct person separate from the author of the trust as well as from the trustee.

6. So far we have taken simple cases where the parties are single individuals. What happens when the parties are multiple parties, and where some of them play double role.

Illus.

(i) A and B are the beneficiaries of a trust. Of them A is also a trustee. Is such a trust valid ?

(ii) A and B are beneficiaries of a trust. Of them A is the author of the trust. Is such trust valid ?

7. The answer to the first question is in the affirmative. It is found in Section 6 which defines a trust. The definition does not give an answer to the Second question. Yet such a trust is invalid.

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CHAPTER II

(i) The Creation of an Express Trust

I. Conditions for the Creation of a valid Trust.

For the validity of a declared Trust the following *four* conditions prescribed by law must be satisfied.

(i) Section 6.

(1) There must be necessary parties to the trust.

(2) The language of the settlor must be such that the Court can find from it, as a fact,

(a) an intention to create a trust;

(b) of ascertainable property ;

(c) in favour of ascertainable beneficiaries and

(d) for an ascertainable purpose.

(ii) Sections 7-8.

The trust property must be of such a nature as to be capable of being transferred and settled in trust.

(iii) Section 4.

The object of the trust must be lawful.

2. The English Law of Trust differs from the Indian Law in regard to the creation of a trust. According to Snell the creation of a trust requires three certainties,

(i) Certainty as to intention.

(ii) Certainty as to trust property.

(iii) Certainty as to beneficiary. According to Underhill the creation of a trust requires *four* certainties, those mentioned by Snell and one more namely.

(iv) The purpose of the trust.

The English Law does not require the transfer of the trust property to the trustee. But the Indian Law does.

(ii) Certainty as to intention

(i) The intention to create a trust may be by words or acts.

(ii) These are illustrations which show how a trust could be created by the acts of the author of the trust.

Illus.

(i) A father opening an account in his book in the name of his son in which money is credited in the name of his son.

9 Bom. 125

(ii) A buying shares in

5 Bom. 268
17 Col. 620 (628)

3. Examples of trust created by words are unnecessary. The question is what kind of language is necessary to show there is a certainty to show that there was intention to create a trust—

(i) No technical expressions are needed for the creation of a trust The matter is one of construction. The question, therefore, which has to be determined is whether upon construction of the will or deed as a whole, the testator intended that the person to whom property was given should take as a mere trustee or should take beneficially, subject to a mere superadded expression of a wish or desire, which the testator may have thought would be sufficient to influence the donee, but which was not intended to and does not impose upon him any obligation. Question is did the author of the trust merely express a wish that the trustee should do a particular thing or did he impose an obligation upon him to do a certain thing. If an obligation was in fact intended then obviously he had the intention to create a trust.

(iii) The language used may be either *precatory* or *imperative.*

(i) The words request, recommend, desire, hope, etc., are precatory words.

(ii) Such words cannot be said to indicate an intention to create a trust, because they do not show an intention to impose an obligation upon the trustee.

(iii) Under the English Law such precatory words were held to constitute a trust and the trusts were called precatory trust. But the modern tendency is against.

(iii) Certainty as to beneficiary

1. The beneficiary must be specified or described sufficiently as to be capable of identification.

2. *Illustrations of uncertainty.*

(i) Estate given to A with the direction that he would continue it in the family—family uncertain.

(ii) To the settlor's relations—relations uncertain.

3. *Illustrations of sufficient description*

(i) Descendents-held to be sufficient description and therefore not uncertain

3. Certainty of Purpose

1. How the property is to be applied must be specified.

2. Illustrations of uncertainty of purpose.

(i) To consider certain persons.

(ii) To be kind to them.

(iii) To make ample provision for them.

(iv) To remember them.

(v) To do justice to them.

(vi) To take care of his nephew as might seem best in future.

(vii) To use property for herself and her children and to remember the Church of God and the poor.

3. The purpose of the trust means the way in which the beneficiaries are to be benefitted the way in which the property is to be applied.

4. Certainty as to trust property

1. The property which is to be the subject-matter of the trust must be indicated with reasonable certainty. It must be specified or sufficiently described so as to be capable of identification.

Illus.

(i) A bequeathes certain property to B—directing him to divide the *bulk* of it among the children of C. There is no creation of a trust because the property is not indicated with reasonable certainty.

(ii) A gives property in trust for his wife and directs that such part of it as may not be required by her shall, after her death, be held in trust for his children.

(iii) A gives property in trust for his servants with a direction to reward them according to their deserts out of such parts of my estate as may not have been sold or disposed of by her.

Conclusion

1. Thus, it must be clear that the settlor intended to create a *definite* trust over *definite* property for *definite* persons. No trust can arise in the absence of an intent to create a definite equitable obligation giving definite equitable rights to definite beneficiaries.

2. It will, however, be noticed that the failure to nominate a definite person as a trustee does not invalidate the trust. Where a trust is clearly intended, then (subject to the rules as to voluntary trust), the mere omission to appoint a trustee will not invalidate the trust: for equity never allows a trust to fail for want of a trustee. So, if no trustee is appointed or if the trustee appointed fails, either by death, or disclaimed or incapacity or otherwise the trust does not fail, but fastens upon the conscience of any person (other than a purchaser for value without notice) into whose hands the property comes and such person holds it as a passive trustee, whose only duty is to convey it to new trustees when properly appointed.

3. The effect of uncertainty as to property or as to beneficiary or purpose of the trust is different:

(i) Where the trust is affected by uncertainty as to property the trust is void. As there is no property capable of identification there is nothing to litigate about.

(ii) Where the trust is affected by uncertainty as to the beneficiary or the purpose the trust is void. As there is no person named as a beneficiary no one can come forward to enforce it.

(iii) Where the property is described with sufficient certainty, and the words actually used, or the surrounding circumstances make it clear that although the donor has not sufficiently specified. The objects of his bounty or the way in which the property was intended to be dealt with yet he never meant the trustee to take the entire beneficial interest, the Law implies a resulting trust in favour of the donor or his representative.

II. Trust Property must be capable of Transfer.

1. *What property is capable of transfer ?*

2. The answer to this question is to be found in section 6 of the Transfer of Property Act.

3. Property which can be transferred may be subject-matter of a trust.

4. But there can be no trust of a beneficial interest under a subsisting trust. A Beneficiary cannot create a trust of his interest in trust. His interest is transferable but he cannot create a trust of it.

5. This marks an important distinction between the English Law and Indian Law of Trust.

6. Under the English Law a beneficiary can create a trust of his equitable estate.

7. The reason is that the Indian Law does not recognize the distinction between legal and equitable estates in a trust.

Sec. II.—**A Trust may be properly created and yet enforceable.**

1. A trust may have been properly created but may not be enforceable. To be enforceable a trust must satisfy two other conditions:—

I. The object of the Trust must not be unlawful.

II. The formalities prescribed for the creation of a trust must be satisfied.

Object of the trust

Sec. 4.

1. The object of a trust must be lawful.

2. *What are lawful objects* ?

(1) The purpose must not have been forbidden by Law.

(2) Purpose must not be such which if permitted would defeat the provisions of any law.

What are unlawful objects ?

(1) Purpose which is fraudulent

(2) Purpose which involves or implies injury to the person or property of another.

(3) Purpose which is immoral or opposed to public policy.

Illus.

(1) Trust for the care of female foundings to be trained as prostitutes.

(2) Trust to carry on smuggling business and to maintain it out of the profits.

(3) Trust by a person in insolvent circumstances—defeating creditors.

(4) Trusts for illegitimate children.

(5) Trust for the creation of a perpetuity.

(6) Trust to take effect upon future separation of husband and wife.

3. Whether the trust is lawful or unlawful is to be determined in the case of immoveable property by the law where the property is situated.

4. A trust which is unlawful is *void.*

5. Where a trust has two purposes of which one is lawful and the other unlawful, the validity of the trust depends upon the severability of the two. If they can be severed, the one with a lawful purpose is valid and the one with an unlawful purpose will be void.

If they cannot be separated the whole will be void.

6. Consequences of settlor creating an unlawful trust—

(i) Court will not enforce it in favour of the person intended to be benefitted thereby.

(ii) Court will not help the settler to recover the estate.

Formalities for a valid trust

Sec. 5.

1. A trust may be a trust of immoveable property or it may be a trust of moveable property. The formalities prescribed by law for the validity of a trust differ according as the property is immoveable property or moveable property.

2. *Formalities in case the property is immoveable.*

Such a trust may be made in two ways—

(i) Either by anon-testamentary instrument signed by the author of the trust or by the trustee, or

(ii) By the will of the author of the Trust,

3. *Formalities in the case of a trust of moveable property.* There are *three* ways by which it could be done.

(1) By a non-testamentary instrument signed by the author of the trust or the trustee.

(2) By a testamentary instrument signed by the author or the trustee.

(3) By transfer of the ownership of property to the trustee.

4. Difference between declaration and creation of Trust.

(Not explained in ms.)

5. Transfer of Trust Property

1. No trust is created until the author of the trust has divested him of the trust property. That means he must have transferred the property to the Trustee.

2. This does not apply where the author of the trust is himself the trustee. All that is necessary to show is that he has changed the character in which he holds it.

3. This does not apply when the trust is created by a will. The will operates after his death and the trustees then take possession.

Section II.—A trust may be valid and yet impeachable.

1. A valid trust may be impeached on the following grounds by the following persons :—

(a) By the settlor or his successors in title on the ground:

(i) of the incapacity of Parties.

(ii) of some mistake made by, or fraud practised on, the settlor at its creation.

(b) By the settlor's creditors, by reason of its having been made with a fraudulent intention to defeat or delay them or because it infringes the provisions of the Insolvency Act.

(c) By future purchasers of the property from the settlor without notice of the trust, where the trust property is land, and though was intended by the settlor to defeat the claims of future purchasers.

I. Incapacity of Parties to a Trust

§ Capacity of the author of the Trust.

1. The author of a trust must be a person who is *competent* to contract, i.e.,

(i) He must be major and

(ii) He must be of sound mind.

2. Although this prevents a minor from making a trust yet the law provides for a minor making a trust, if the conditions prescribed are observed under the Law, a trust may be made by or on behalf of the minor, provided it is done with the permission of the Principal Civil Court of original jurisdiction.

The Principal Civil Court of original jurisdiction is according to the Civil Procedure Code the District Court.

3. This competency of the Author of the Trust to make a trust is limited in two ways—

(i) The property which is to be the subject-matter of the trust must be transferable.

(ii) He can transfer it only to the extent permitted by Law for the time being in force. A trust is not valid if the author had no power to dispose of property.

4. What property is transferable and what is not is defined in section 6 of the T. P. Act.

5. The authority to dispose of property and the extent of such power depends upon law.

Illus.

(i) A Hindu father cannot dispose of the ancestral property and therefore, he cannot create a trust thereof.

(ii) A Hindu widow cannot dispose of the estate inherited by her from her husband. She having only a life-estate in it—therefore, she cannot dispose of it by way of Trust.

(iii) A Mohammedan cannot dispose of more than 1/3 of his property after the payment of debts and funeral expenses— therefore, cannot dispose of more than 1/3 by way of a Trust.

§ Capacity to be a Trustee—

Sec. 10.

1. Every person capable of holding property is competent to be a trustee.

2. *Who is capable of holding property ?*

Every *living person* is capable of holding and taking property. Therefore, every living person whether a minor or a lunatic is capable of being a trustee.

3. There is a difference between capacity to contract and capacity to hold and take property. Every living person does not have the capacity to contract; but every living person has the capacity to hold and take property.

4. This distinction is necessary to make and important to bear in mind because a person may not have capacity to contract yet he may be competent to be a trustee provided he has capacity to hold

and take property ;be not dead physically he must not be dead civily:

(1) A person who is sentenced to transportation is not civily dead.

7. There is one further distinction which is to be noted. Ordinarily a person who is competent to be a trustee is also competent to execute a trust. But in the case where a trust involves the use of discretion the person who is competent to be a trustee is not necessarily competent to execute a trust.

8. Where the trust is such that it does not involve the use of discretion the requirement for competency to execute a trust is the same for being a trustee, namely, capacity to hold and take property.

9. Where the trust is such that its execution does involve the use of discretion, then the trustee must have capacity to contract.

Capacity to be a Beneficiary—

Sec. 9.

1. Every person capable of holding property may be a beneficiary.

2. The requirement for being a beneficiary is the same as for being a trustee.

3. That is every living person can be a beneficiary. That is a trust can be created in the interest of every living person. It is not necessary that a beneficiary should have contractual capacity. In this respect his position is regulated by the same provisions as that of the trustee.

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CHAPTER III

The Revocation of an Express Trust Declared

Sec. 78.

1. Whether a trust can be revoked depends upon how the trust is created.

(i) If the trust is created by a will then it can be revoked by the testator *at his pleasure*. This is because will does not take effect till death. There is can be revoked before it takes effect.

2. If the trust is created otherwise than be a will—i.e., by a non-testamentary instrument or by word of mouth then it can be revoked in the following circumstances only—

(i) If the power of revocation is expressly reserved to the author of the trust.

(ii) If the beneficiaries consent, provided all of them are competent to contract

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CHAPTER IV

The Extinction of an Express Trust

Sec. 77.

1. A trust comes to end in the following cases—

(i) When the purpose is completely carried out.

(ii) When its purpose becomes unlawful.

(iii) When the fulfilment becomes impossible.

(iv) When the trust being revocable is expressly revoked.

(v) If there is only one beneficiary or if there are several (whether entitled concurrently or successively) and they are or they are not under any disability (such as infant, lunatic) the trust may be extinguished by them without reference to the wishes of the settor or the trustees.

2. The terms for the extinction of a trust are the same as those for the extinction of a contract.

1. Two questions remain to be considered.

(i) When does a trust becomes administrable ?

(ii) What estate does the Trustee and Beneficiary have in the trust ?

2. These questions are preliminary to the question of the administration of the turst.

I. When does a trust begin to function ?

A trust becomes administrable when it has been accepted by the Trustee and the beneficiary—

I. Disclaimer and acceptance of a Trust

Acceptance Art. 34=Sect. 10.

1. Although the author of the trust may appoint a person as a trustee, the person so appointed is not bound to accept such appointment.

2. A person appointed to the office of a trustee may accept the office or he may disclaim it.

3. The acceptance of the office may be indicated expressly or by conduct. If it is by conduct it must indicate with reasonable certainty such acceptance.

Illus.—*A* by his will bequeaths certain properties to *B* and C as Trustees for *D, B* and *C* prove A's will. On a question being raised whether *B* and *C* had accepted the office of Trustee, held that their conduct in proving the will was tantamount to acceptance of office.

4. Other illustrations of acceptance by conduct are :—

(i) Acceptance by acquiescence—Permitting an action regarding trust property being brought in his name.

(ii) Acceptance by exercising dominion over the trust property—such as advertising for sell—giving notice to tenants.

(iii) Acceptance by dealing with property—unless the dealing is plainly referable to some other ground.

(iv) Acceptance by long silence with notice of the trust and in the absence of any satisfactory explanation of the silence.

(v) Acceptance of a part of the trust is acceptance of the whole, notwithstanding any attempted disclaimer of part.

5. The law does not say how a disclaimer is to be made by a trustee who does not wish to accept the office. It only says that a trustee must do so within reasonable time.

6. Although the law is silent on the point, the following points with respect to disclaimer have been settled by judicial decisions—

(i) The disclaimer should be before acceptance. Once a trustee has accepted the office he can renounce it only under circumstances mentioned in section 46.

(ii) A person can disclaim a trust although he may have consented to act as a trustee during the lifetime of the settlor.

(iii) A person cannot disclaim the office as to a part of the trust and accept as to the rest.

(iv) A disclaimer may be by words or by conduct.

7. Effect of disclaimer.

(i) If there is only one trustee a disclaimer prevents the trust property from vesting in him.

(ii) If there are two more trustees and if one of them disclaims, such a disclaimer vests the trust property in the other or others or makes him or them the sole trustee or trustees from the date of the creation of the trust.

8. What happens when there is only one trustee and he disclaims.

Two things can happen :—

(i) A new trustee may be appointed under section 73—

(a) By one mentioned in the trust.

(b) If there be none such, by the settlor if alive and competent to contract.

(ii) If no trustee is appointed in place of the one who has disclaimed the property reverts to the settlor or his representatives if he is dead.

9. What happens to the property ? Is it freed from the trust ? Does it remain subject to the trust ?

The answer is that the trust is not extinguished. The settlor or his representatives, if the settlor is dead, holds it on trust for the beneficiary. In other words the settor or his representative becomes the trustee in place of the trustee who has disclaimed.

The rule is that a trust will never fail for want of a trustee. Wherever a trust exists, and there is no trustee to execute it, the person in whom the legal estate vests holds the property as trustee. This rule is intended to protect the beneficiary.

Mallott vs. *Wilson (1903) 2 Ch. 494.*

II. Disclaimer and acceptance by Beneficiary—

Section 9

1. A beneficiary is not bound to accept the trust. He may accept it or he may disclaim it.

2. His disclaimer amounts to a renunciation of his interest under the trust.

3. If he wishes to disclaim he can do so in two ways :

(i) By a disclaimer addressed to the trustee or

(ii) By setting up a claim inconsistent with the trust with the knowledge of the trust.

4. A claim inconsistent with the trust would be a claim such as ownership of the trust property.

4. What happens to the trust when the beneficiary disclaims ?

III. The Estate of a Trustee under a Trust. (Page left blank)

IV. The Estate of a Beneficiary under a Trust. (Page left blank)

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PART III
THE ADMINISTRATION OF A TRUST

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THE The Administration of a Trust UST

In connection with the Administration of a Trust, the Trustee has certain—

(i) Duties—Sections 12—20.

(ii) Liabilities—Sections 23—30

(iii) Rights—Sections 31—36.

(iv) Powers—Sections 37—45.

(v) Disabilities—Sections 46—54.

Similarly the beneficiary has certain—

(i) Rights—Sections 55—67.

(ii) Liabilities—Section 68.

I. Duties of a Trustee

Sections 12—20

V (2) Duty to obey directions contained in the Trust.

IV (3) Duty to act impartially between the beneficiaries.

IV (4) Duty to sell Wasting and Reversionary property.

IV (5) Duty in relation to payment of outgoing of Crops and income.

IV (6) Duty to exercise reasonable care.

IV (7) Duty in relation to the Investment of Trust Funds.

IV (8) Duty to pay Trust moneys to the Right Persons.

* Each page contains only the heading and not the details—ed. thoried.

IV (9) Duty in relation to delegation of Duties and Powers.

IV (10) Duty to act jointly when there are more than one Trustees.

* IV (11) Duty not to set up *Jus Tertii*

* IV (12) Duty to act gratuitously.

* IV (13) Duty not to traffic in Trust Property.

* IV (14) Duty to be ready with Accounts.

V. Powers of a Trustee

Sections 37—45.

V. The powers of a Trustee

*V (1) General Powers of a Trustee.

* V (2) Power of Trustees to sell or mortgage the Trust Property.

* V (3) Power in relation to conduct of sales.

* V (4) Power to give receipts.

* V (5) Power to compound and settle disputes.

* V (6) Power to allow Maintenance to Infants.

* V (7) Power of Trustees to pay Cost of Beneficiary.

* V (8) Suspension of the Trustee's Powers by Administrative Action.

* Each page contains only the heading and not the details—ed.

VI. Powers of the Beneficiaries

* VI (1) Power of a sole beneficiary.

* VI (2) Power of one of several beneficiaries.

25. Is a trustee liable for breach of trust by his predecessor ? He is not.

26. Is a trustee liable for the breach of trust committed by a Co-trustee ?

He is not except in the following cases:—

(i) Where he has delivered trust-property to his Co-trustee without seeing to its proper application.

(ii) Where he allows his Co-trustee to receive trust property and fails to make due inquiry as to the Co-trustee's dealings therewith or allows him to retain it longer than the circumstances of the case reasonably require.

(iii) Where he becomes aware of a breach by a Co-trustee and conceals it or does not take proper steps to protect the property.

27. **Breach of Trust jointly committed by Co-trustees.**

What is the liability for each ? Is it for the whole ? Each is liable for the whole to the beneficiary. There will be a right of contribution from the rest.

28. Liability for Payment by a Trustee to a person who is not the person in whom the beneficiary's interest is not vested.

Trustee is not liable, provided :

(i) He had no notice that the interest had vested in another person.

(ii) That the person to whom payment is made was a person who was entitled to payment.

XIII. Protection to Trustees

* (1) General Protection.

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*XIII (2) Statute of Limitation.

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* Each page contains only the heading and not the details—ed.

* XIII (3) Concurrence of or waiver or Release by the Beneficiary.

* XIII (4) Protection against acts of Co-Trustees.

* XIII (5) Right of contribution and indemnity as between Co-trustees.

* XIV. Liability of Third Parties and Beneficiaries.

* XIV (1) Liability of Third Parties and Beneficiaries who are parties to a Breach of Trust.

* XIV (2) Following Trust Property into the hands of Third Parties.

* The pages contain only the headings and not the details—ed.

PART IV
CONSTRUCTIVE TRUSTS

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PART IV

Constructive Trusts

1. There are *fourteen* cases of constructive trusts which are enumerated in the Trust Act.

2. They fall under *five* heads :—

(1) Constructive Trusts arising out of Transfers—Sections 81, 82,84,85.

(2) Constructive Trusts arising out of unfair advantage gained by one person as against another person—secs. 85, 88, 89, 90, 93.

(3) Constructive Trusts arising out of contracts made—Secs. 86, 91,92.

(4) Constructive Trusts arising out of a merger of two personalities in one individual—section 87.

(5) Constructive Trusts arising out of a past trust—Section 83.

(1) Transfer or Bequest of Property

(i) Section 81.

1. In certain cases the transfer or bequest of property imposes an obligation upon the tranferee or legatee in the nature of a trust in favour of the owner or his legal representative.

Ordinarily the transferee or legatee would take the property absolutely without any such obligation.

2. When can it be held that the transferee or legatee takes it subject to an obligation ? He takes it subject to an obligation when there is no intention on the part of the owner to dispose of the beneficial interest in the property to the transferee or legatee.

3. How is intention to be determined ?—In the light of the circumstances of the case. It is the circumstances which must be referred to in order to find out the intention of the owner.

(ii) Section 82.

1. The second case where the transfer of property imposes an obligation upon the transferee in the nature of a trust is the case where the transferee is made to one and the consideration is paid by another—in such a case the transferee holds it on trust for the person who paid the consideration.

Ordinarily the transferee would be the owner in the eye of the law, the property being conveyed to him by the transferor.

2. This rule that a transferee who has not paid consideration holds it on trust for a person who has paid consideration applies generally except in one case—

3. *Exception :*

This rule does not apply where there is an intention on the part of the person who paid the consideration to benefit the transferee.

4. *Proof of intention.*

(iii) TRANSFER FOR AN ILLEGAL PURPOSE.

Section 84.

1. Ordinarily when a transfer is for an unlawful purpose the Court will neither enforce the transaction in favour of the transferee nor will it assist the transferor to recover the estate if he has parted with it.

2. But the rule does not apply under *all* circumstances. The rule does apply under certain circumstances.

3. What are the circumstances in which the rule does not apply ?

The circumstances in which the rule does not apply are—

(i) If the porpose is not carried into excecution.

(ii) If the transferor is not as guilty as the transferee.

(iii) If the effect of permitting the transferee to retain the property might be to defeat the provisions of any law.

4. In these cases the Court will help the transferor and impose upon the transferee an obligation to hold the property for the benefit of the transferor.

(iv) BEQUEST UPON TRUST FOR AN ILLEGAL PURPOSE.

Section 85.

1. The position in law with regard to transfers for an illegal purpose is on a par with trust for an illegal purpose.

2. That is, a Court will neither enforce the trust in favour of the parties intended to be benefited nor will it assist the settlor to recover the estate if he has parted with it.

9 Bom. S.R.542.

3. Section 85 recognizes a trust although the purpose is unlawful. This is in contrast with the general principle enunciated in section 4 of the Trust Act and therefore requires some explanation.

4. The general principles governing the rights of the parties to an unlawful trust and the exceptions to those principles may formulate as follows:—

I. Where a trust is created for an unlawful and fraudulent purpose, the Court will neither enforce the trust in favour of the parties intended to be benefited nor will it assist the settlor to recover the estate (except in one case).

Q.—Why is a beneficiary not allowed to enforce it ?

A.—Because it would be giving effect to an unlawful purpose.

Q.—Why is the author not allowed to recover the estate if he has parted with it ?

A.—Because it would be helping him to take advantage of his own fraud.

II. The one case in which the settlor allowed to recover the property although the trust is for an illegal purpose is the case where the illegal purpose has failed to take effect.

Q.—Why is this exception made ?

A.—There are two reasons :—

(i) The purpose being unlawful no trust arose—it being void *ab initio*.

(ii) The trustee having paid no consideration has no right to retain the beneficial interest in the property which must, therefore, return to the settlor.

III. The disabilities attaching to the author of an unlawful trust do not apply to his legal representatives—

Q.—Why ?

A.—Because they are not parties to the transactions.

5. The reason why section 85 recognizes a trust in favour of legal representatives is because they are innocent parties having nothing to do with the creation of an unlawful trust.

(2) Constructive Trusts arising out of unfair advantage—

I. Section 85.

1. The first case under this head arises where property is bequeathed under a will and the testator during his life-time wanted to revoke the bequest and he is prevented from revoking it by coercion.

2. Under such circumstances the legatee takes the property not as a beneficial owner thereof but holds it as a trustee for the legal representatives of the testator.

3. The reason is that the legatee has taken unfair advantage by using unfair means. He cannot, therefore, be allowed to retain such an advantage.

II. Section 88

1. The second case arises when any person who is bound to protect the interest of another person by reason of his fiduciary relationship with the latter.

2. Persons who fall in this category are—

(i) Agent and Principal.

(ii) Partners in a firm.

(iii) Guardian and ward.

(iv) Trustee and beneficiary.

(v) Executor and Legatee.

3. The section says—

(i) That any such person who gains any pecuniary advantage by availing himself of his fiduciary.

(ii) Enters into any dealings under circumstances in which his own interests are adverse to those of the person whom he is bound to protect and thereby gains for himself a pecuniary advantage

Then

He must hold the advantage so gained for the benefit of the person whose interest he was bound to protect.

4. *Illus.*

(i) A partner buys land in his own name with funds belonging to his firm. He must hold it for the benefit of the partners.

(ii) A trustee, retires from his trust in consideration of a bribe paid to him by his Co-trustee. The trustee must hold the sum for the benefit of the trustee.

(iii) An agent is employed by A to secure a lease from B of a certain property. The agent obtained a lease for himself. The agent must hold it for the benefit of B.

(iv) A guardian buys up the incumbrances on his ward's property at an undervalue. He can charge the ward only for the value he has actually paid for the incumbrances.

III. Section 89

1. The third case arises where advantage is gained at the cost of another person by the exercise of undue influence.

2. This is dealt with in section 89. Section 89 says that such a person must hold the advantage for the benefit of the person who is the victim of such undue influence.

3. This is subject to two limitations—

(i) The advantage must have been gained without consideration or

(ii) The person must have had notice of the advantage having been gained by undue influence.

IV. Section 90

1. The fourth case arises where advantage is gained by a qualified owner availing himself of his position as such in derogation of the rights of other persons interested in the property.

2. This is dealt with in section 90. Section 90 says that such an advantage shall be held for the benefit of all and not merely for the benefit of the one who secured it.

3. Subject to two conditions—

(i) The others must repay their due share of expenses properly incurred for securing such advantage.

(ii) The others must bear proportionate part of their liabilities property contracted for gaining such an advantage.

4. Cases covered are those of co-tenants, members of joint family, mortgagee, etc.

V. Section 93

1. The fifth case arises where the advantage is gained by a creditor secretly.

2. Such a case generally arises when the creditors accept a composition from a debtor who is unable to pay his debts in full.

3. If it is found that one of the creditors who is a party to the composition has by arrangement with the debtor unknown to the other creditors gains better terms for himself he shall not be

entitled to retain the advantage gained by him by reason of such better terms which have caused prejudice to other creditors.

4. The law will regard him as a trustee for the other creditors in so far as the advantage gained by him is concerned.

(3) Constructive Trusts arising out of Contracts

I. Section 86

1. The first case dealt with by the Trust Act under this head relates to a contract for the transfer of property.

2. It falls under section 86. Section 86 refers to a contract in pursuance of which property is transferred and where the contract is of such a character that—

(i) It is liable to recession or

(ii) It is induced by fraud or mistake.

3. The transferee of the property under such a contract shall hold the property for the benefit of the transferor.

4. This obligation arises only under certain circumstances and is not absolute:

(i) The obligation arises only on receiving notice from the transferor that the contract is liable to recession or that it has been induced by fraud or mistake.

(ii) The obligation will be enforced only on repayment by the transferor of the consideration actually paid by the transferee.

II. Section 91

1. Acquiring property with notice that is subject to a contract with another person.

2. In such a case the person who acquires the property must hold it for the person who had contractual rights in it.

3. This obligation is limited in its extent. It is enforced only to the extent necessary to give effect to the contract.

4. This obligation does not arise in the case of every acquisition of property which is subject to a contract. It applies only in the case of a contract which could be specifically enforced.

III. Section 92

1. Property bought for being held on trust for certain persons.

2. A contracts to buy property from B and represents to B that the purpose of buying it is to hold the property on trust for C. B believing in the representation of A sells the property to A.

3. A must hold the property for the benefit of C.

4. This obligation is also limited in its extent—It is enforced only to the extent necessary to give effect to the contract.

5. The contract may be to hold part of the property in trust for C. In that case the obligation will be enforced only to the extent of the property.

(4) Constructive Trust arising out of merger of two personalities in one individual.

I. Section 87

1. This provides for the case of double personality—one man but two persons.

2. Every contract, debt, obligation or assignment requires two persons.

3. But these two persons may be the same human being.

4. In all such cases, were it not for the recognition of double personality, the obligation or incumbrance would be destroyed by merger.

5. Because no man can in his own right be under any obligation to himself; or own any incumbrance over his property.

6. But with the recognition of the double personality this is possible.

7. In fact this is necessary.

8. *Illustration*—

Debtor becoming executor.

Executor is the owner in the eye of the law.

Merger. Extinction of debt.

9. Section says no.

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PART V

THE ADMINISTRATION OF A CONSTRUCTIVE TRUST

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PART V

The Administration of a Constructive Trust

THE INDIAN TRUST ACT

1. The Law relating to Trust is contained in Act II of 1882.

2. It is an Act which defines and amends—that means that it does not introduce any new principle.

3. The Act does not consolidate the Law—That means that it is not an Exhaustive Code.

4. The object of the Act was to group in one to enact the legal provisions relating to trusts. Before the Act of 1882 the statutory law relating to trust was contained in 29 *Car II. C. 31 sections 7—11.*

Act XXVII of 1866

Act XXVIII of 1866

There were also few isolated provisions scattered through the Penal Code, Specific Relief, C. P. Code Stamp Act, Limitation, Government Securities Act, Companies Act, Presidency Banks Act.

5. As originally passed, the Act did not apply to the whole of British India. For instance, it did not apply to Bombay. But provision was made to extend it by notification by local Government.

6. It is unnecessary to discuss here whether the Hindu Law and Mohammedan Law recognized trust as defined in the Trust Act. That may be dealt with by others.

The nature of a Trust

1. Trust is defined in section 3. A trust involves three things :

(1) A person who is the *owner* of some property.

(2) Ownership burden with an obligation.

(3) Obligation to use the property for the benefit of another or of another and himself.

2. It is ownership without beneficial enjoyment. It involves separation of ownership and beneficial enjoyment.

3. A trust arises out of a confidence reposed in and accepted by the owner.

4. The owner in the eye of the law is the trustee. After the trust is created the author of the trust ceases to be the owner of the property.

I. WHAT IS A TRUST.

1. The terms Trust and Trustee are defined in various enactments of the Indian Legislature.

(i) *Definition in Specific Relief Act I of 1877.*

Section 3—

(1) *Obligation* includes every duty enforceable by law.

(2) *Trust* includes every species of express, implied or constructive fiduciary ownership,

(3) *Trustee* includes every person holding expressly, by implication, or constructively a fiduciary ownership.

(ii) *Definition in the Indian Trustees Act XXVII of 1866.*

Section 2—

"Trust shall not mean the duties incident to an estate conveyed by way of mortgage; but with this exception, the words *trust* and *trustee* shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of executor or administrator of a deceased person.

(iii) *Definition in Limitation Act IX of 1908.*

Section 2 (ii)—

Trustee does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied or a wrong-doer in possession without title.

(iv) *Indian Trusts Act II of 1872.*

(1) Section 3—"A trust is an obligation annexed to the ownership of property...

(2) Ingredients of a Trust

(i) A Trust in an *obligation.*

(ii) The obligation must be annexed to the *ownership* of property.

(iii) The ownership must arise out of *confidence* reposed in and accepted by the owner.

(iv) The ownership must be for the benefit of another (i.e., a person other than the owner) or of another and the owner.

Explanation of Terms

I. THERE MUST BE OBLIGATION.

II. OBLIGATION MUST BE ANNEXED TO OWNERSHIP PROPERTY.

1. There may be an obligation to which a person is subject although there is no property to which it is annexed.

E.g. *Torts* assault—

2. There may be property without there being any obligation attached to it.

E.g. *Full* and *complete* ownership—sale of property.

III. THE OWNERSHIP OF PROPERTY MAY BE FOUNDED IN CONFIDENCE OR IT MAY NOT.

Illus.

A person may transfer ownership to another with the intention of conferring upon him the right to enjoy the property.

A person may transfer ownership to another without the intention of conferring upon him the right to enjoy the property.

The difference between ownership founded in confidence and ownership not founded in confidence consists in this—

(i) In the latter there is *a jus in re* (a complete and full right to a thing) *or jus ad rem* (an inchoate and imperfect right).

(ii) In the former there is not

E.g. Bailment.

3. The nature of a trust can be better understood by contracting it with other transactions resembling a trust.

Trust distinguished from agency

1. Where there is a trust, the ownership of the trust property is in the trustee. The trustee is personally liable on all contracts entered into by him in reference to the trust, although he may have a right of recourse against the trust funds or against the beneficiary.

2. An agent has no ownership in law in the goods entrusted to him. If an agent enters into a contract as agent, he is not personally liable. The contract is with the principal.

Trust distinguished from Condition

1. Cases of condition differ from cases of trust in two respects—

First. A trust of property cannot be created by any one except the owner. But A may dispose of his property to B upon condition express or implied that B shall dispose of his own property in a particular way indicated by A.

Second. The obligation of the person on whom the condition is imposed is not limited by the value of the property he receives, e.g., if A makes a bequest to B, on condition of B paying A's debts, and B accepts the gift, he will be compelled in equity to discharge the debts although the exceed the value of the property.

2. But the words "upon condition" may create a real trust. Thus a gift of an estate to A on condition of paying the rents and profits to B constitutes a trust because it is clear that no beneficial interest was intended to remain in A.

A may dispose of his property to B upon condition express or implied that B shall dispose of his property to C. There is a condition in favour of C.

Is this a trust ?

Trust distinguished from Bailment

1. Bailment is a deposit of chattel and may in a sense be described as a species of trust. But there is this great difference between a bailment and a trust, that the general property in the case of a trust, is in the trustee, whereas a bailee has only a special property, the general property remaining in the bailor.

2. The result of this difference is that an unauthorized sale by a trustee will confer a good title upon a *bona fide* purchaser who acquires the legal interest without notice of the trust, whereas such a sale by a bailee confers as a rule no title as against the bailor.

3. Bailee does not become the owner of the property as a result of the bailment. But a trustee does in law become the owner

of the property as a result of the trust notwithstanding he is under an obligation to deal with the property in a certain specified manner.

Trust distinguished from Gift

Ordinary contract differs from a trust. Contract which confers a benefit on a third party closely resembles a trust.

1. There is a similarity between a Trust and a Gift inasmuch as in both the transfer results in ownership. The Trustee and the Donee both become owners of the property.

2. But there is a difference between the two. In a gift the donee is free to deal with the property in any way he likes. In a Trust the trustee is under an obligation to use the property in a particular manner and for a particular purpose.

Trust distinguished from Contract

1. That there is a distinction between trust and contract is evident from the existence of differing legal consequences attached to a trust and to a contract:

(i) A trust, if executed, may be enforced by a beneficiary who is not a party to it whilst only the actual parties to a contract can, as a rule, sue upon it.

(ii) An executed voluntary trust is fully enforceable while a contract lacking consideration is not.

2. However, the determination of the question whether a given set of facts gives rise to a trust or a contract is not easy. What is the test ?

Keetan—pp. 5-6	(1919) A. C. 801 (1926) A. C. 108	38 Bom. S. R. 610.

It is a question of intention.

Trust distinguished from Power

1. The term "power" in its widest sense includes every authority given to a person (called the donee of the power) to act on behalf of or exercise rights belonging to the person giving him the authority (called the donor of the power).

2. Powers are of many kinds e.g.

(i) The common law power of an agent to act for his principal, given sometimes by a formal "power of attorney".

(ii) Statutory power such as the power of sale given to a mortgagee.

(iii) The various express and implied equitable powers possessed by trustees and executors.

(iv) Powers to appoint trusts so as to create equitable interests.

3. The power of appointment is a transaction which resembles a trust and it is this which must be distinguished from a trust.

The word appointment means -pointing out, indicating- the act of declaring the destination of specific property, in exercise of an authority conferred for that purpose-the act of nominating to an office.

The last class termed *powers of appointment* are made use of where it is desired to make provision for the *creation* of future interests, but to postpone their complete declaration.

Thus in a marriage settlement, property may be given to trustees upon trust for the husband and wife for their lives and, after the death of the survivor upon trust for (i) *Such of the children* of the marriage as the survivor shall appoint, or (ii) *All the children* of the marriage in such shares as the survivors shall appoint. In such a case, upon appointment being made, the child to whom it is made takes exactly as if a limitation to the same effect had been made in the original instrument.

A power of this kind, where there is a restriction as to its objects (i.e., persons in whose favour it may be exercised) is termed a *special power of appintment*. But there may be a *general power* of appointment when there is no such restriction, so that the donee may appoint to himself. In such a case the donee having the same powers of disposition as an owner, is for most purposes treated as the owner of the property :

(i) A power may give a mere discretion and therefore is distinct from a trust, which creates an obligation or (ii) A power may impose an obligation to exercise the discretion.

In the former case there is no trust. In the latter case there is. The former is called mere *power*. The latter is called power in the nature of a trust or *power coupled with trust*.

(iii) There is also a third category of cases which are cases of a *trust coupled with a power*.

These are cases where a trustee of a property though under an obligation to apply it for the benefit of certain individuals or purposes, may have a *discretion* as to whether he will or will not do certain specified acts, or as to the amount to be applied for any one individual or purpose or as to the time and manner of its application. In such cases, the Court will prevent the trustee from exercising the power unreasonably, it will not compel him to do such acts or attempt to control the proper exercise of his discretion.

1. Power resembles a trust and also differs from it.

(i) It resembles a trust inasmuch as a power is an authority to dispose of some interest in land, but confers no right to enjoyment of land.

(ii) It differs from a trust inasmuch as a power is discretionary, whereas a trust is imperative ; the trustee if he accepts must necessarily do as the settlor directs.

* VII. NEW TRUSTEES.

(1) Survivorship of the office and estate or trustee on death.

*(2) Devolution of the office and estate on Death of the survivor.

*(3) Retirement or Removal of a Trustee.

*(4) Appointment of New Trustees.

* VIII. APPOINTMENT OF A JUDICIAL TRUSTEE.

* IX. THE PUBLIC TRUSTEE.

(1) Nature and Function.

*(2) Appointment of a Public Trustee as an ordinary Trustee.

* Except the title, each page is left blank in M.S.—ed.

*(3) Appointment and Removal of the Public Trustee.

*(4) Duties, Rights and Liability of the Custodian Trustee and Managing Trustee.

*(5) Special Rules relating to the Public Trustee.

* X. The Rights of the Trustee.

(1) Right to Reimbursement and Indemnity.

*(2) Right to discharge on completion of Trusteeship.

*(3) Right to pay Trust Funds into Court.

*XI. Right of Trustees and Beneficiaries to seek the assistance of Public Trustee or Court.

*(1) Right of Official audit.

*(2) Right to take direction of Court.

*(3) Right to have Trust administered by Court.

*(4) Right to take direction of Court.

*(5) Right to have Trust administered by Court.

XII. Consequences of a breach of Trust.

1. *Definition of Breach of Trusts.*—Breach of trust is defined in section 3, a breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a breach of trust.

2. *Under the English Law.*—Any act or neglect on the part of a trustee which is not authorized or excused by the terms of the trust instrument, or by law, is called a breach of trust.

3. *Breach of Duty.*—A trustee has Duties, Right, Powers and disabilities. Only breach of duty is breach of trust.

1. *The measure of liability* is the loss caused to the trust property.

* This is the title on each page. There are no details—ed.

2. Is he liable to pay interest ? Only in the following cases—

(a) Where he has actually received interest.

(b) Where the breach consists in unreasonable delay in paying trust-money to the beneficiary.

(c) Where the trustee ought to have received interest, but has not done so.

(d) Where he may be fairly presumed to have received interest.

(e) Where the breach consists in failure to invest trust-money and to accumulate the interest or dividents.

(f) Where the breach consists in the employment of trust property or the proceeds thereof in trade or business.

3. Is he entitled to set off a gain from breach of trust against a loss from breach of trust.

He cannot.

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5. THE LAW OF LIMITATION

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OUTLINE OF LECTURES
ON
THE LAW OF LIMITATION

I. INTRODUCTORY

1. § Nature of the Law of Limitation.

2. § Distinction between Limitation—Estoppel—Acquiescence and Laches.

3. § The object of the Law of Limitation.

II. ARRANGEMENT OF THE LAW OF LIMITATION

1. § Operation of Lapse of time under the Indian Statute Law.

2. § Scheme of the Act.

III. APPLICABILITY OF THE ACT

1. § In respect of territory.

2. § In respect of Special Proceedings.

3. § In respect of Criminal Proceedings.

4. § In respect of Civil Proceedings.

5. § In respect of Persons

(not legible) against a Special Law.

IV. QUESTIONS ARISING OUT OF COLUMN 3

I. When does time begin to run

1. § General Rule.—When Right to sue accrues.

Exceptions :

(1) § Cases where limitation commences *before* the Right to sue accrues.

(2) § Cases where limitation does not commence even when the right to sue has accrued.

(3) § Cases where there arises a fresh starting-point of limitation.

(Note.—S. Nos. of parts and Chapters are retained as of original MS.—ed.)

2. § Starting point in cases of successive wrongs.

3. § Starting point in cases of continuing wrongs.

II. AGAINST WHEN DOES TIME BEGIN TO RUN ?

1. § When against the Plaintiff.

2. § When against the Defendant.

V. QUESTIONS ARISING OUT OF COLUMN 2

I. HOW IS THE PERIOD TO BE COMPUTED ?

1. § Calender.

2. § Cases in which time is excluded.

3. § Cases in which time lost is deducted.

II. CAN THE PERIOD BE EXTENDED ?

III. CAN THE DELAY BE EXCUSED ?

IX CONSTRUCTION OF THE STATUTE OF LIMITATION

(1) General Principles.

(2) Specific and Residuary Articles.

PART IV.—QUESTIONS ARISING OUT OF COLUMN I

Division I—Suits

Group I—*Suits for money*. 57-64-85.

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(2) Monies had and received—62.

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Explain.

Group V.—*Suits to recover immovable Property*

Explain—

(1) Suits based on title.

(2) Suits based on possession.

(a) By adverse possession.

(b) By dispossession.

(3) Suits based on partition.

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Explain.

Group VII.—*Suits to set aside Decrees and Orders of Courts and Government Officers*—11, 11A, 12, 13, 14.

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VII—**Law of Prescription** (Page left blank)

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THE INDIAN LAW OF LIMITATION

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I. INTRODUCTORY

1 What is the nature of the Law of Limitation ?

1. There are various ways in which a time-limit enters into a course of litigation :

(1) Cases where the law says action shall be taken *within* a stated period:

Illus.—Order 6 Rule 18.—Amendment of a Plaint. Party obtaining leave to amend must amend within the time fixed by the Court for amendment and if no time is fixed then within 14 days.

(2) Cases where the law says action *shall not* be taken before a certain period has elapsed.

Illus.—Section 80 of the C. P. C.—Suit against Secretary of State. No suit shall be instituted against the Secretary of State for India in Council or against any public officer in respect of any Act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been given.

(3) Cases in which the law prescribes that action shall not be taken *after* a certain period has elapsed.

2. It is the *third* class of cases which strictly speaking constitute the subject-matter of the Law of Limitation.

2 Distinction between Limitation—Estoppel—Acquiescence and Laches

All these have the effect of denying to an aggrieved party a remedy for the wrong done to him. That being so it is necessary to distinguish them from Limitation as such.

Limitation and Estoppel

1. By Limitation a person is prevented from getting relief because of his having brought the action after the time prescribed for bringing his suit.

2. By Estoppel a person fails to get relief because he is prevented by law from adducing evidence to prove his case.

Limitation and Acquiescence

1. Limitation defeats a suitor in the matter of obtaining relief for a wrong because he has *consented* to the doing of the wrong because his suit is beyond time.

2. Acquiescence defeats a suitor in the matter of obtaining relief for a wrong becasue he has *consented* to the doing of the wrong.

Limitation and Laches

1. Both have one common feature—relief is denied on the sole ground that action is not brought within time.

2. The distinction lies in this—In limitation time within which action shall not be brought is prescribed by Law. In laches there is no time prescribed and the Court, therefore, in granting relief works on the principle of unreasonable delay.

3. In India the doctrine of laches has not much scope because of the Law of Limitation which has prescribed a definite time limit for almost all actions. It does not, therefore, matter whether a man brings his suit on the first day or the last day of the period prescribed by law for his action.

4. The doctrine of laches applies in India only in the following cases:

(1) Where the relief to be granted by the Court is *discretionary*.

This is so

(i) In cases falling under specific relief.

(ii) In cases falling under interlocutory relief.

(2) Where the Law of Limitation does not apply e.g. Matrimonial suits

Delay would mean that the offence was condoned.

3 The object of Limitation

1. Two things are necessary for a well-ordered community

(i) Wrongs must be remedied.

(ii) Peace must be maintained.

2. To secure peace of the community it is necessary that titles to property and matters of right in general should not be in a state of constant uncertainty, doubt and suspense.

3. Consequently, if persons are to be permitted to claim relief for what they think are wrongs done to them, then they must be compelled to seek relief within a certain time. There is nothing unjust in denying relief to a person who has tolerated the wrong done to him beyond a certain period.

4. The Law of Limitation is based upon this principle.

5. That being the underlying principle, the Law of Limitation is absolute in its operation and is not subject to agreement or conduct of the parties. That is to say it is not subject to

(1) Waiver.

(2) Custom.

(3) Estoppel.

(4) Variation in respect of enlargement or abridgement of time by agreement of parties sections 28 and 23 of the Contract Act.

6. In this respect the Law of Limitation differs from the Law of Negotiable Instruments.

7. *Limitation and the onus of Proof.*

1. The onus of proof is upon the Plaintiff. He must prove that his suit is within time.

37. Bom. S. R. 471-A.I.R. 1935 September.

A by a registered lease, dated 8th July 1922, gave certain lands to *B* on a rental for a period of 25 years. Subsequently, A dispossessed *B* alleging that the lease was taken by undue influence. *B* brought a suit against *A* for an injunction restraining *A* from interferring in any way with his possession and enjoyment and for possession of land.

It was contended on behalf of B that A was precluded from challenging the validity of the lease, on the ground that if he had sued to have the lease set aside the suit would have been barred by Limitation. In other words, it was contended that the plea of the Defendant was barred of the Limitation.

Question is : Is Defendant bound by the Law of Limitation ? The answer is No. —Section 3 refers to Plaintiff and not to Defendant.

8. *Plea of Limitation and the Stage of the Proceedings.*

1. The plea of limitation may be raised at any stage of the proceedings, i. e., it can be raised even in second appeal.

2. It can be raised for the first time in appeal

38 Mad. 374

36 Cal. 920

38 Cal. 512

38 Bom. 709 (714),

3. It can be raised in appeal even though it was abandoned in the trial Court.

3 All. 846 (848).

4. It can be raised before the Privy Council although it had been abandoned in the Courts below.

36 I A. 210.

5. This is subject to the proviso that when it is raised in the appeal stage Court will not allow it if the facts on record are not sufficient for its decision and if it involves a further inquiry into facts.

57 Cal. 114.

II. THE INDIAN LAW OF LIMITATION

Its Scheme of arrangement

Operation of Lapse of time under Indian Statute Law

1. Lapse of a definite period of time produces four results under Indian Statute Law.

(1) It multiplies the right of the holder to obtain a remedy for the wrong—Section 3 of the Limitation Act.

(2) It not only bars his remedy but extinguishes his right—Section 28 of the Limitation Act.

(3) It confers a right to light, air, way, watercourse, use of water or easements on a person who has enjoyed it for a prescribed period—Section 26 Limitation Act.

(4) It extinguishes right to easements—Section 47 of Act V of 1882.

(2), (3), (4) are cases which fall under the Law of Prescription. (1) Only falls under the Law of Limitation. The Limitation Act deals with a mixed body of law and two must be studied separately.

III. THE INDIAN LAW OF LIMITATON

Its Applicability

1. In respect of Territory

1. The Act extends to the whole of British India—*Section 1 (2).*

2. The Act applies to *every* suit instituted, appeal preferred and application made in Courts functioning in British India.

3. It does not matter where the cause of action, whether in British India or outside British India, it does not matter where the transaction took place, whether in British India or outside British India, if the suit is instituted or appeal is preferred or application is made in a Court in British India, the Law of Limitation that will apply will be the Indian Law of Limitation and not Foreign Law of Limitation.

4. There is one exception to this rule which is enacted in section 11 (2) which says : A Foreign Rule of Limitation shall be a defence to suit in British India on a contract entered into in a foreign country if the rule has extinguished the contract and that the parties were domiciled in such country during the period prescribed by such rule.

2. In respect of Proceedings

I. Special Proceedings

(1) *Arbitration Proceedings*

It was at one time doubted if the Limitation Act applied to proceedings before an Arbitrator on the ground that it applied only to suits, appeals and applications to the *Court* and that the Arbitrator was not a Court. This doubt has now been resolved by the Privy Council which has held that where persons have referred their disputes to arbitration, the arbitrator must decide the dispute according to the existing law and that he must recognize and give effect to every defence of limitation, unless that defence has been excluded by agreement between the parties.

(1929) 56 I. A. 128.

Ques. This decision goes to the length of laying down that parties can vary the Law of Limitation by private agreement. This seems to overlook the provisions of sections 28 and 23 of the Contract Act.

(2) *Proceedings under the Companies Act.*

When a Company is being wound up and a liquidator is appointed to carry on the affairs of such Company, Section 186 of the Company's Act provides that the liquidator may make an *application* to the Court for an order upon a person "to pay any moneys due from him to the Company." Ordinarily there would have to be a suit. But to avoid multiplicity of suits this special proceedings is permitted by law.

Question is whether Limitation applies to such proceedings. It has been held that "money due" in section 186 meansmoneys due and recoverable in law, i.e., *moneys not* time-barred. This means that the Law of Limitation applies to such proceedings.

60 I. A. 13 (23)

(3) *Proceedings under the Income Tax Act.*

The Civil Courts in India have no jurisdiction in matters of public revenue.

They can have such jurisdiction only if a particular Revenue Act invests them with such jurisdiction. For example a provision will be found in section 66(3) of the Indian Income Tax Act of 1922. Under the section, a party aggrieved by an order of the Income Tax Officer in the matter of assessment may apply to him for stating a case to the High Court and if he refuses may apply to the High Court for an order compelling the Commissioner to state a case and refer it to the High Court.

There is a time-limit for such an application. But the Law of Limitation does not apply to it. The time-limit is the time-limit prescribed by the Income Tax Act and not by the Law of Limitation.

(4) Proceedings before the Commissioner of Workmen's Compensation

The Workmen's Compensation Act, 1923, provides for Compensation to be paid to workmen for injuries caused to them

in the course of their employment. The cases are heard by a Commissioner. The Commissioner is a special tribunal and not a Court and therefore the Limitation Act does not apply to proceedings before him.

This does not mean that the claim for compensation for injury can be prosecuted before him at any time. That would be so if the Act had made no provision for a time-limit. As the Act has presented six months as the time-limit, suits have to be brought within that period.

(5) Proceedings under Registration Act.

(1) Presentation of Documents—4 months.

(2) Appearance of Parties for admitting Documents—4 months.

3. Criminal Proceedings

1. Criminal Proceedings are generally instituted in the name of the Crown because they involve a breach of the King's peace.

2. It is a maxim of Constitutional Law that lapse of time does not affect the right of the King.

3. That being so the Law of Limitation does not apply to criminal prosecutions.

4. Two things may be noted :

(1) There are many Acts which prescribe limits of time for institution of prosecution under those Acts. E.g. Government of India Act, Section 128 : Opium Act, Customs Act, Salt and Excise Acts and Police Act.

(2) Limitation Act, although it does not provide for any time-limits for criminal prosecutions, it does provide for *appeals* under the Cr. P. C.

4. Civil Proceedings

(i) With regard to *suits* different kinds of suits have been specified in different Articles. There is also a general residuary Article No. 120 which is made to apply to any suit for which no period of limitation is provided elsewhere in the Schedule. The Act, therefore, applies to *all* suits.

(ii) With regard to *appeals* there are two Courts to which appeals can lie in India—(i) The Court of a District Judge and (ii) The High Court. The Limitation Act specifies appeals to both these Courts and therefore, it can be said that the Law of Limitation applies to all appeals.

(iii) With regard to *applications,* different kinds of applications are enumerated in the different articles in the Schedule. As in the case of articles relating to suits there is also an Article 181 for applications for which no period of limitation is prescribed elsewhere in the schedule or by section 48 of the C. P. C. But almost all High Courts have held that the operation of this Act is to be restricted to applications under the C. P. C. only. That being so it is clear that the Limitation Act *does not apply* to *all* applications. For instance it does not apply to :

(i) Applications for the grant of probate letters of administrations succession certificates.

(ii) Applications under the Rules of the High Court

32 Bom. 1

48 Cal. 817

46 Cal. 249.

(iii) Applications under a Local or Special Act (unless such Act provides for it).

These not being matters dealt with by the C. P. Code.

In respect of persons

1. The general rule is that the plea of limitation applies to every Plaintiff.

2. Originally, limitation did not apply to the Crown when it sued as a Plaintiff, on the ground that lapse of time did not affect the Crown. This maxim of Constitutional Law although it governs criminal prosecutions has been negatived so far as civil proceedings by the Crown are concerned by Article *149* of the Limitation Act which applies to every kind of *suit brought by Government,* and prescribes *60* years as the time-limit. Suits *against* Government must be brought within the ordinary time-limits.

15 Mad. 315.

Similarly, suits by private persons *claiming through* Government are also subject to the ordinary time-limit prescribed by the Act. This was always the rule. It was not always the rule for Government to bring a suit within any prescribed time. This

has now been altered. It can, therefore, be said that as a rule the Law of Limitation applies to *all* persons whether they are private persons or corporate bodies of Governments, and that the plea of limitation is available to every Defendant as against every Plaintiff whether that Plaintiff is a private person or a Government.

3. The plea of limitation is available to every Defendant. To this rule there are certain exceptions.

37 Bom.—S.R. 471

Section 10.

I. The defence of limitation is not available to a person in whom property has become *vested in trust* for any specific purpose nor is it available to his legal representatives or assigns (not being assigns for valuable consideration), in a suit for recovery of the property or the proceeds thereof or for an account of such property. This section is to be applied to an *express trust as* distinguished from an *implied* or *constructive trust.* A trustee of an implied or constructive trust can take the defence of limitation.

Distinction between an Express Trust and Implied or Constructive Trusts.

Persons, therefore, who are holding a fiduciary position are not trustees within the meaning of Section 10 ; E.g. Agent, Manager, Factor, Benamidar, Executor or Administrator, Banker, Surviving partner, Director of a Company Liquidator of a Company, *Karta* or Manager of a joint Hindu family.

Secondly Section 10 is applicable only in cases of persons "in whom property has become *vested** in trust for a *specific purpose" 44 Mad. 277(281-2).*

What is Specific Purpose ? A specific purpose is a purpose that is actually and specifically defined in the document by

* What is meant by vested ? The following suits are excluded —

(1) Suits seeking to make the trustee liable for what he might have received.

(2) Suits to enforce Plaintiffs' personal right to manage trust properties.

(3) Where there is an invalid trust, a suit to recover the property from the trustees in the enforcement of **a** resulting trust—*20 Bom, 511.*

(4) Suits for compensation for breach of trust— *581. A. 279 (297).*

which the trust is created for a purpose which from the specified terms can be certainly affirmed.

49 I. A. 37 (43)

58 I. A. 1

That being so even a trustee *de son tort* would fall within this Section.

Meaning of *a trustee de son tort.*

Explanation.—Hindu, Mohammedan and Charitable endowments are declared to be express trusts and their managers express trustees.

Thirdly.—Section 10 not only applies to the defaulting trustee himself, but also applies to his legal representatives and assigns except assigns for valuable consideration. Purchasers for value from a defaulting trustee are protected and they can plead limitation.

Whether purchasers from a trustee must in addition to being purchasers for value should also be purchasers without notice of trust is a point on which the Act is silent. Judicial decisions on this point are, however, in conflict.

Section 29 (3) II. The Limitation Act does not apply to parties litigating under the Indian Divorce Act (IV of 1869).

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As against a Special Law

1. Besides this General Law of Limitation there are other special or local laws which also prescribe time-limits for suits, appeals or applications. In case there is a difference between the time-limits fixed by the general and special law, question is which law is to prevail.

2. The answer to this question is given in Section 29. According to the Section the special law will prevail over the general law.

3. Section 29 also provides for the applicability and non-applicability of the other Sections of the Limitation Act in cases of conflict between the general and special law as to time-limit.

4. According to Section 29, in cases of conflict the provisions of Sections 4, 9 to 18 and 22 of the Limitation Act will apply

(unless expressly made inapplicable) and the remaining provisions of the Act shall not apply (unless expressly made applicable by the Special Law).

The Scheme of the Law of Limitation

1. The Indian Limitation Act consists of 29 Sections and one Schedule.

2. The Schedule is divided into three Divisions :

First Division—deals with Suits.

Second Division—deals with Appeals.

Third Division—deals with Applications.

3. The Schedule in respect of each of its Divisions is cut up into 3 Columns.

Column 1—Describes the nature of the claim for which suit is brought or of the appeal or if application is made.

Provision is made for 154 different classes of suits.

Provision is made for 9 different classes of appeals.

Provision is made for 26 different classes of applications.

Each of these provisions is numbered seriatum and is called article no. so and so. There are in all 189 articles in the Schedule though the last article is 183, that is, because some articles have the same number and are distinguished by the addition of A to the same number.

Column 2.—Specifies the period *within* which the suit must be filed, appeal or application must be made.

Column 3.—Specifies the starting-point of the period of limitation within which *suit* must be filed or appeal or application must be made.

4. The Sections of the Act in so far as they deal with the Law of Limitation as distinguished from the law of prescription deal with various questions arising out of the three columns of the Schedule. The Schedule, therefore, is the most important part of the Law of Limitation.

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IV. LAW OF LIMITATION

Questions arising out of Column 3

Subject-matter of Column 3

1. Column 3 deals with the starting point of Limitation. Two Questions arise—

(1) When does time begin to run ? What is the starting point of Limitation ?

(2) Is there only one starting point of Limitation? *Or* Can there be a fresh starting point of Limitation ?

I. *When does time begin to run ?*

What is the starting-point of Limitation.

1. The answer to the question as to when time begins to run is this. Time in respect of the institution of *a suit, appeal or application* begins to run from the occurence of the event mentioned in Column 3. In most cases the event is the incident. But in some cases it is the knowledge of the incident to the Plaintiff—90-92. Whether it is the incident or the knowledge of the incident, in any case the occurence of the event in Column 3 marks the starting point of limitation.

Two questions with respect to right to sue and cause of action.

(1) Must a Plaintiff sue when there is a cause of action ?

2. Confining to suits it may be said that time begins to run when the right to sue arises—Article 120. This is the first fundamental Rule.

When does the right to sue arise ? It arises—

(i) When the event mentioned in column 3 occurs if the suit falls under any of the articles.

(ii) When the suit does not fall under any specific article but falls under the general article (120) then right to sue accrues when the cause of action arises or in certain cases knowledge that cause of action has arisen comes to the Plaintiff, so that time begins to run from the occurence of the cause of action or from the date of the knowledge of the cause of action.

Cause of action arises when a wrong is done to a party. Every wrong does not necessarily give rise to a cause of action. The wrong must under the circumstances be real and necessitate taking of action.

(iii) The effect of death on the starting point of Limitation.

1. When does limitation commence in the case of a person who dies before the right to sue accrues to him ?

2. When does limitation commence in the case of a person who dies before another person gets a right to sue him ?

I. When a person dies *before* the right to sue accrues to him the period of limitation *will commence* when there is a legal representative of the deceased capable of instituting such a suit.

II. When a person against whom a right to sue would have accrued dies before such accrual, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom a suit could be brought.

Exception to the fundamental Rule—Limitation runs from the moment the right to sue accrues

I. Cases where Limitation commences *before* the right to sue accrues.

(i) Money payable on demand and money payable on a Bill or a Pronote made on demand.

In these cases unless there is a demand to pay and there is a consequent refusal to pay there is no right to sue. The right to sue arises on the date of the refusal to pay. But time begins to run not from the date of the refusal but from the date of the loan or the date of the Bill or note, i.e., *before* right to sue has accrued. 57—58—59—67—73

(ii) Redemption of a Pledge—suits on—

The pawnee's right to sue to recover the pledge accrues on the date on which the debt in respect of goods pledged is paid off by him. But time begins to run not from the date of payment but from the date of the pledge, i.e., *before* the right to sue has accrued—145.

§ Cases where Limitation does not commence even the right to sue has accrued—Sections *6, 7, 8*

1. These are cases where a person to whom a right to sue has accrued is suffering from a disability the date on which the right to sue accrued.

2. According to this exception time will not run against a person who is suffering from a disability although the right to sue has accrued to him.

3. Only three kinds of disabilities are recognized— (i) minority, (2) lunacy, (3) idiocy,

4. In the case of a person suffering from a disability, time commences when the disability ceases.

5. Where these disabilities are concurrent or succession in their operation, limitation commences when all such disabilities have ceased.

7. Where the disability continues upto the death of the person then time will commence against his legal representative from the date of his death.

8. If the legal representative is under a disability at the death of the person then time will commence when the disability of the legal representative comes to an end.

9. What is the effect of a disability of persons who are jointly entitled to sue upon the starting point of limitation.

Two cases must be distinguished :

(i) Where only some of them are under a disability,

(ii) Where *all of them* are under a disability.

I. Where *only some* of them are under a disability :

(i) Where full discharge or release can be given to the Defendant by the party not *under disability* without the concurrence of the person under a disability time will commence to run against all of them from the time the right to sue accrues.

(ii) Where no such discharge can be given, time will not run against any of them until the disability ceases or until the person under disability loses his interest in the subject-matter.

II. Cases where *all* persons who are entitled to sue are under a disability :

(i) Where *all* are under a disability, rules laid down in Section 6 will apply.

(ii) Where one of them *ceases* to suffer from the disability, Section 7 will apply and the governing question will be whether the person who is free from his disability give a valid discharge without the concurrence of those who continue to suffer from their disability. If the answer is in the affirmative, time will commence to run against *all* from the moment the disability of such a person has ceased to operate. If the answer is in the negative then time will not run against any of them until *all* of them cease to suffer from their disabilities.

9. Within what time from the date of the Cessation of the disability, a suit must be brought by the person who was under a disability when the right to sue accrued to him ?

1. There are three answers to this question.

(i) Within the prescribed period *to be counted from the date of the accrual of the right to sue, it* the period left over after the cessation of the disability is more than three years.

Illus. Prescribed period—12 years from 1920 to 1932.

Years of disability—4 years i.e. 1924 to 1936.

Period left over—9 years. Suit must be brought before 1932.

Suit must be brought within 9 years, i.e., within 12 years from the accrual of the right to sue i.e. within the prescribed period. He gets no benefit at all. Even his time is counted from the date of the accrual of right to sue.

(ii) Within the prescribed period *to be counted from the cessation of the disability,* if the period prescribed is less than three years.

He gets no benefit from his disability ; only his time begins to run from the date of the cessation of the disability.

Illus. Prescribed period 1 year from 1920 to 1921.

Years of disability—4 years. *S. P.* 1924 Bar 1925. Suit must be brought in 1925.

(iii) Within *three* years from the date of the cessation of the disability, if the period left over after the cessation of the disability is *less* than three years and the period prescribed is *more* than three years.

Prescribed period—6 years from 1920 to 1926.

Years of disability—4 years from 1924—Bar 1930.

Period left over after cessation is—2 years.

Suit must be brought in 1928 within three years from cessation of disability.

10. Some points to be noted with regard to this question of disability.

(i) The Section applies only to *suits* and to applications for the execution of a decree, but not to any other applications, nor to appeals.

(ii) The Section applies only to a person who was already under a disability when the right to sue accrued. If the disability supervenes *subsequently* than the Section does not apply.

(iii) The Section applies only where the *Plaintiff* or the person entitled to sue is under a disability. The disability of the *Defendant*—person liable to be sued—does not matter at all.

Time will begin to run against the Plaintiff even if the Defendant is suffering from a disability.

First Fundamental Rule is that limitation starts in the case of person who is not suffering from a disability, from the date of the occurrence of the event mentioned in Column 3 and if no event is mentioned in Column 3 then from the date when the cause of action is said to arise.

Fundamental Rule II

1. When once time has begun to run, no subsequent disability or inability to sue stops it.

2. This means that Limitation, once it starts is never suspended. If a person becomes insane or dies *after* the right to sue has accrued,time will continue to run against them.

II. Is there only one starting-point of Limitation ? OR Can there be a fresh starting point of Limitation.

1. Distinction must be made between the occurence of a fresh cause of action and the occurence of a fresh staring point if limitation in respect of the *same* cause of action. We are here considering cases where there occurs a fresh starting point of limitation in respect of the *same* cause of action.

2. The general rule of the Law of Limitation is that for a right to sue there is *only one* starting point of limitation and that starting point dates from the day when the right to sue accrues.

3. There are three cases where there is a fresh starting point of limitation in respect of the same cause of action :

(i) Case where there is an acknowledgment.

(ii) Cases where there is a pan payment.

(iii) Cases where the cause of action arises out of a continuing breach of contract or out of a continuing Wrong independent of contract.

Section 19—§ Acknowledgment

I. Generally

1. The acknowledgment must have been made *before* the period of limitation has actually run out. An acknowledgment made *after* the period has run out is of no avail and cannot be given a fresh starting point of limitation.

2. The acknowledgment must be in writing.

3. The acknowledgment must be signed by the party liable or by his agent duly authorized to sign an acknowledgement of liability.

4. The acknowledgement need not be *to the* creditor.

5. The acknowledgement must contain an admission of a *subsisting liability*. It need not contain a promise to pay. Indeed it may be coupled with a refusal to pay or with a claim to a set-off.

II. Section 21 (2)—Acknowledgement by persons jointly liable

1. When a property or a right is claimed against persons who are jointly liable such as joint-contractors, partners, executors, motgagees, etc., an acknowledgement signed by any one of them (or by the agent of any one) render the rest chargeable.

III. Section 21 (3)—Acknowledgement by a Hindu widow

Acknowledgement by a Hindu widow or other limited owner shall be binding upon the reversioners.

IV. Section 21 (3)—Acknowledgement by a Hindu Manager

The acknowledgement signed by (or by the agent of) the Manager of a joint Hindu family shall be binding upon the whole family where the acknowledgement is in respect of a liability incurred by or on behalf of the whole family.

§ Payment of interest on debt or on Legacy and Section 20—Part-payment of the Principal

1. The payment must be payment before time has run out.

2. The payment is made by the debtor or by his agent duly authorized to make such payment.

3. The payment must be *voluntary*.

Section 23—§ Continuing breach of contract and continuing wrong independent of contract

1. In the case of a continuing breach of contract or a continuing wrong, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong continues.

Q.—What is meant by a continuing breach and a continuing wrong-?

Continuing breach of contract

1. Covenant to repair in a lease which is broken every day the premises are out of repair.

2. Use of premises contrary to the covenants in the lease.

Continuing wrongs in respect of a tort

1. Infringement of a trade mark.

2. Refusal of a wife to return to her husband.

In these cases the right to sue arises *de die in diem* (from day to day).

3. The distinction between a continuing and a non-continuing wrong is very difficult to draw. A wrong continues either because the effect of a wrongful act once done continues or because the wrongful act is repeated.

The case of a continuing wrong is the case where the wrongful act is repeated and not where the effect of a wrongful act continues.

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6. THE LAW OF CRIMINAL PROCEDURE IN BRITISH INDIA

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THE LAW OF CRIMINAL PROCEDURE IN BRITISH INDIA

PRELIMINARY

Wrong and the Remedy for it

1.* One of the clauses in the constitution of the U. S. A. runs thus :

> "No citizen shall be deprived of his life, liberty and property without due process of law".

Such a clause is not found in the constitution of other states. All the same every civilized State seeks to protect the life, liberty and property of its citizen from unwarranted attacks.

Such a guarantee is the foundation of the state. With this object in view every state has a code of laws which defines what are wrongs. In India we have the Penal Code and the law of Torts.

2. Wrongs are either civil *or* criminal.

Some wrongs are both civil as well as criminal; *Assault, Defamation :* they are both civil as well as criminal wrongs. The aggrieved party can proceed both in a criminal court and also in a civil court.

3. *Remedy*. It would be of no avail whatsoever merely to enact wrongs if for every wrong an appropriate remedy is not provided. On the other hand, it may be said, that the law recognizes a wrong only when it provides a remedy for its vindication. When there is no remedy provided for the commission of a wrong, the enactment of a wrong would be an idle work.

Liberty of a person and the writ of Haheus Corpus.

4. The Criminal Procedure Code is a remedial law. It provides a remedy to the aggrieved patty against the offender for the vindication of the criminal wrong done to him. It is a

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* Paragraph numbers are retained as of original— ed.

popular notion that the law allows ten guilty persons to escape rather than punish an innocent individual. This is absolutely incorrect. All that the law says is that no man shall be tried except in accordance with the procedure laid down by law.

5. The Criminal Procedure lays down :

(1) The Constitution of the Criminal Courts.

(2) The means and methods by which the accused may be brought before a Criminal Court for his trial.

(3) The rules as to trial of an accused.

(4) The rules as to punishment, and

(5) The rules as to rectification of an error in the trial, conviction or punishment of an accused.

* * * *

I. Constitution of Criminal Courts

7. For a proper understanding of this subject a distinction must be drawn between the Presidency Towns system and the Provincial system.

Such distinction is often made in India in respect of other laws as well:

e.g. Insolvency— 1. Presidency Towns Insolvency Act.
2. Provincial Insolvency Act.

Small Causes— 1. Presidency Towns Small Causes Courts Act.
2. Provincial Small Causes Courts Act.

A. Provincial System

1. Sessions Courts

Section 7(1)

8. 1. Every Province shall be a Sessions Division or shall be divided into more than one Sessions Division. Every Sessions Division shall be coterminus with a district or more than one district.

Section 9 (3)

3. For any Sessions Division there may be Additional Session Judges and Assistant Judges to exercise jurisdiction in one or more of Sessions Courts.

* Para 6 is missing in the MS.—ed.

Section 9 (2)

4. The Court of Session shall hold its sitting at such place or places as may be notified by the L, G.* in the Official Gazatte.

Section 9 (4)

5. A Sessions Judge of one division may also be appointed as an Additional Sessions Judge of another division in which case he may sit in either division to dispose of cases.

2. Magistrates Courts

9. (1) District Magistrate.

Section 10

(1) In every district there *shall* be magistrate of the first class who shall be called the District Magistrate.

(2) Any magistrate of the first class may be appointed to act as an Additional District Magistrate.

(2) Sub-Divisional Magistrate.

Section 8 (1)

10. A District may be sub-divided into a sub-division.

Section 13 (1) and (2)

A Magistrate of the 1st or 2nd Class may be placed in charge of a sub-division and shall be called a Sub-Divisional Magistrate.

(3) Subordinate Magistrates.

Section 12 (I)

11. In every District there may be appointed besides the District Magistrate, as many persons as may be necessary to be Magistrates of the first, second or third class.

They will exercise jurisdiction in such local areas as may be defined in the case of each.

Section 12 (2)

If no such area is fixed, their jurisdiction and power shall extend throughout such District.

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* Local Government—ed.

3. District Magistrate and 1st Class Magistrate

The Code does not recognize any particular Court as that of the District Magistrate, but only Courts of 1st, 2nd and 3rd Class Magistrate.

Where a trial was commenced by an officiating District Magistrate and before its close he reverted to his original position as 1st Class Magistrate in which capacity he had jurisdiction over the offence, it was held : he had jurisdiction to continue the trial.

Emp. v/s Sayed Sajjad Husain 3 A.L.J. 825

11. As regards original jurisdiction, whatever the District Magistrate might do with regard to offences committed outside the division, the Sub-Divisional Magistrate is competent to try within his local jurisdiction. *4 A. 366.*

4. Special Magistrate

Section 14(1)

12. (1) In any local area persons may be vested with the powers of the Magistrate of the 1st, 2nd or 3rd class in respect of particular cases or classes of cases or in regard to cases generally.

(2) To be called a Special Magistrate and to be prescribed for a term.

(3) Such a person may be an officer under its control.

(4) If he is a police officer, he shall not be below the grade of Assistant District Superintendent and he shall not have any power beyond what is necessary for :

(i) preserving the peace

(ii) preventing crime

(iii) detecting, apprehending and detaining offenders in order to their being brought before a Magistrate

(iv) the performance by him of other duties imposed upon him by any law for the time being in force.

5. Bench Magistrates

Section 15 (1)

13. Any two or more Magistrates may sit together as a Bench and may hear such cases or such classes of cases only and within such local limits as may be prescribed in that behalf.

6. Relation of the different Courts in the Provincial System

Section 17 (2)

14. Every Bench and every Magistrate in a sub-division shall be subordinate to the Sub-Divisional Magistrate. Within a sub-division, the jurisdiction of the District Magistrate and sub-divisional Magistrate are coordinating. *4 All. 366.*

Magistrate who is subordinate to S. D. M. is also subordinate to D. M. All Benches and Magistrates including Sub-Divisional Magistrates are subordinate to the District Magistrate.

Section 10(3)

An Additional District Magistrate shall be subordiate to the District Magistrate for the purpose only of:

(i) Section 192 (1)

(ii) Section 407 (2)

(iii) Section 528 (2) and (3).

Section 17 (3)

All Assistant Sessions Judges are subordinate to the Sessions Judge in whose court they exercise their jurisdiction.

15. Subordinate.—(1) inferior in rank.

9 Bom. 100

8 Mad.18(F.B.)

(2) Subordinate in respect of judicial as well as executive powers.

2 *All. 205 (F. B.)*

9 Bom. 100. There may be inferiority without subordination, but there cannot be subordination without inferiority, as subordinate means inferior in rank.

Section 17 (5)

Neither the District Magistrate nor the Magistrate and Benches shall be subordinate to the Sessions Judge except to be expressly provided by the Code.

Subordinate to the Sessions Judge only for the purposes of Section 123, 193, 195,408,431,436,437. If a Sessions Judge rule that touts should not be admitted to the Court it would not apply to the magistracy.

Subordinate means not merely subordinate so far as the regulation of work is concerned. Subordinate also means judicially inferior in rank, i. e. a Court over which another Court can proceed under Section 435. (call for records and pass orders) *9 Bom. 100.*

B. Presidency Towns System

1. Magistracy

Section 18(1)

16. In each of the Presidency Towns, a sufficient number of persons shall be appointed to act as Presidency Magistrates.

Of the number appointed for each town, one shall be appointed to act as a Chief Presidency Magistrate.

Any person may be appointed to act as an additional Chief Presidency Magistrate.

Section 19

17. Any two or more Presidency Magistrates may sit together as a Bench.

2. Relation of the Presidency Magistrates to the Chief Presidency Magistrate

Section 21

18. He is like a District Magistrate controlling Magistrates subordinate to him.

Local Government is to declare the extent of such subordination.

Control:

1. Conduct and distinction of business and practice in Courts.
2. Constitution of Benches.
3. Settle times and places at which Benches shall sit.
4. Settle differences of opinion.

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18. The Bombay Government has defined that Presidency Magistrate shall be subordinate to the Chief Presidency Magistrate.

I Bom. L. R. 437.

High Court

19. Along with these Criminal Courts, we have the High Courts of Judicature.

The High Courts owe their origin to the Charter Act passed by Parliament in 1861.

Section 1 empowered Her Majesty by *letters patent* to erect and establish High Courts for Bengal at Calcutta, for Bombay at Bombay, and for Madras at Madras.

Section 9

Each of the High Courts to be established under *Section 106* of this Act shall have and exercise all *such* Civil. Criminal, Admirality, and Vice-Admirality, Testamentary, Intestate and Matrimonial Jurisdiction, *original and appellate* and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established as His Majesty may grant and direct.

High Court's Power of Superintendance

3 Pat L.J. 581. 7.B.

Sheonandan v/s Emperor.

1. High Court's powers of superintendance are limited by Section 15 of the Act of 1861 (Section 107 of the Government of India Act) to Courts subject to its appellate jurisdiction.

2. But where the High Court has appellate jurisdiction, even in a *modified* form from an inferior Court, it will exercise superintendence over that Court, even in cases which are not subject to appeal.

3. There are three classes of cases to be considered:

(a) Where a subordinate Court is subject to the *appellate jurisdiction* of the High Court, in certain cases, only the right of superintendence exists and its exercise is not confined to cases where a right of appeal lies to the High Court. This special power of superintendence is not as a rule exercised in cases where there is an adequate remedy by other proceedings such as appeal or revision.

(b) In cases in which the High Court has powers of revision over subordinate or where the power of reference to the High Court exists, a modified form of appeal may be said to exist

(c) The power of superintendency may be conferred upon the High Court by the Act constituting the subordinate Court independantly of Section 15 of the Charter Act.

4. A Court may be established without being made subject to the superintendence of the High Court.

The Relation of the High Court to other Criminal Courts

Section 15, 107

Each of the High Courts shall have powers of superintendence which may be subject to its appellate jurisdiction and shall have powers to call for returns etc.

What are the Courts subject to its appellate jurisdiction ?

Letters Patent.

The High Court shall be a Court of appeal from the Criminal Courts in the Presidency.

3. *Pat. L.J. 5817. B* — *Two questions*

Sheonandan v/s Emperor

1. Can the High Court have power of Superintendence where it has no power of appeal but has only power of revision or reference ?
2. Can there be a Criminal Court in the Presidency which will not be subject to its power of superintendence.

The Local limits of the jurisdiction:

10. (1) of the District Magistrate is the District.

11. (2) of the Sub- Divisional Magistrate is the Sub-Division.

12. (3) of the subordinate Magistrate, such local area as the Local Government may prescribe.

14. (4) of the Special Magistrate, such local area as the Local Government may prescribe.

20. (5) of the Presidency Magistrate.

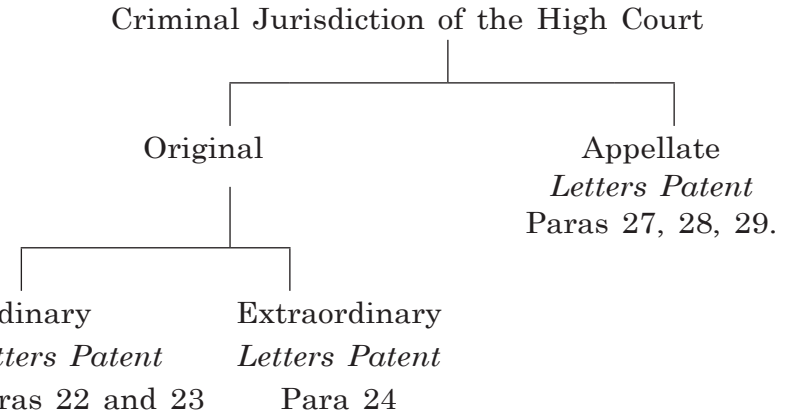
Every Presidency Magistrate shall exercise jurisdiction in all places within the Presidency-town for which he is appointed and within the limits of the port of such town and of any navigable river or channel leading thereto, as such limits are defined under the law.

(6) Sessions Judge—within the Sessions Division.

(7) High Court.

What are the powers granted *by* *letters-patent* in criminal matters.

22. The *letters patent* direct that High Court Jurisdiction shall be as follows:—



23. **Ordinary original Criminal jurisdiction.**—High Court shall have original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction.

24. **Extraordinary original Criminal Jurisdiction.**—High Court shall have Extraordinary Original Criminal Jurisdiction in places within the jurisdiction of any court subject to its superintendence.

25. *Appellate Criminal Jurisdiction.*—High Court shall be a Court of appeal from the Criminal Courts in the Presidency and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force.

Sentence on Escaped Convict

Section 396.

(1) When a sentence is passed on escaped convict, such sentence, if of death, or fine or whipping shall subject to the provisions hereinafter contained, take effect immediately, and if on imprisonment, penal servitude or transportation, shall take effect according to the following rules, that is to say—

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately.

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, penal servitude or transportation, as the case may be, for a further period equal to that which at the time of his escape remained unexpired of his former sentence.

Explanation : for the purposes of this Section :

(a) a sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment.

(b) a sentence of imprisonment with solitary Confinment shall be deemed severer than a sentence same description of imprisonment with solitary comfinement; and

(c) a sentence of rigorous imprisonment shall be deemed severer man a sentence of simple imprisonment with or without solitary confinement.

397. *Sentence on a person already undergoing sentence.*—

When a person already undergoing a sentence of imprisonment, penal servitude or transportation is sentenced to imprisonment,

penal servitude or trasportation, such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or trasportation to which he has been previously sentenced unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence: Provided that, if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately, or at the expiration of the imprisonment to which he has been previously sentenced : Provided, further, that where a person, who has been sentenced to imprisonment by an order under Section 123 in default of furnishing security, is whilst undergoing such sentence sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

398. (1) Nothing in Section 396 of 397 shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

(2)

399. **Confinment of youthful offenders in Reformatories.**

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Suspensions, Remissions and Commutations of Sentences

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Section 401

Governor-General in Council or Local Government may suspend or remit on conditions or without conditions any sentence.

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Section 402

Power to commute sentences for any other mentioned

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IV. Conferment, Continuance and Cancellation of Powers

Section 39

(1) In conferring powers under this Code, the Local Government may, by order, empower persons specially by name or in virtue of their office or classes of officials *generelly* by their official titles.

(2) Every such order shall take effect from the date on which it is communicated to the person so empowered.

Section 40

Whenever any person holding an office in the service of Government who has been invested with any powers under this Code throughout any local area is *appointed* to an equal or higher office of the same nature within a local area under the same Local Government, he shall, unless the Local Government otherwise directs, or has otherwise directed, exercise the same powers in the local area in which he is so appointed.

Section 41

(1) The Local Government may withdraw all or any of the powers conferred under this code on any person by it, or by any officer subordinate to it.

(2) Any powers conferred by the District Magistrate may be withdrawn by the District Magistrate.

Statement made by a witness in deposition is not a complaint.

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PART II

Trial of an Offender

I. Taking Cognizance of an offence

When an offence has been committed, there are three ways in which the Magistrate can take cognizance of an offence.

Section 190

(a) upon receiving a complaint of facts which constitute such offence.

(b) upon a report in writing of such facts made by any police-officer.

(c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed.

A. Complaints to Magistrates.

1. Definition of a complaint.

= means the allegation made *orally* or in writing to a Magistrate, with a view to his taking action under the Cr. P. C. that some person, whether known or unknown, has committed an offence, but it does not include the report of a police-officer.

Complaint must allege that an offence has been committed.

An application for taking action under Section 107 is not a complaint.

Complaint must be with Magistrate ; it must be with a view to his taking action.

Mere statement to a Magistrate by way of information without any intention of asking him to take action, is not a complaint.

e.g. An Assistant Collector writing to the District Magistrate complaining against a party but merely 'solicited for orders', did not amount to a complaint.

40 All. 641

It must be with a view to taking action under this Code.

A statement made to a Magistrate with the object of inducing him to take action not under this Code, but under Section 6 of the Bombay Gambling Act IV of 1887, is not a complaint within the meaning of this Section.

15 Cr. L. F. 657

II. WHO MAY COMPLAIN

As a general rule the person aggrieved is the complainant.

But the complainant is not an essential party for initiation of criminal proceedings.

The Magistrate can act upon information received or upon his own knowledge.

Although, if he does so act, he shall be bound by the provisions of Section 491.

But there are exceptions to the general Rule.

These exceptions will be found in Sections 195 to 199-A. Section 195 deals with

(a) Prosecution for contempts of lawful authority of public servants.

(b) Prosecution of certain offences against public justice.

(c) Prosecution of certain offences relating to documents given in evidence.

In cases coming under (a) No courts shall take cognizance except on the complaint in *writing* of the public servant concerned or of some other public servant to whom he is subordinate.

In cases coming under (b) No court (shall take cognizance)*

except on the complaint in writing of such Court or of some other Court to which such Court is subordinate.

* Inserted—ed.

In cases coming under (c) (No Court shall take cognizance)*

except on the complaint in writing of such Court or of some other Court to which such Court is subordinate.

Section 196.Prosecution for offences against the State.

Unless upon complaint made by order of, or under authority from, the Governor General in Council, the Local Government, or some officer empowered by the Governor General in Council in this behalf.

Section 196-A

Prosecution for certain classes of Criminal Conspiracy falling under Section 120-B of the I. P. C.

If they fall under sub-Section (I) then :

Complaint must be under order of, or under the authority from, the Governor General in Council, the Local Government or some officer empowered by the Governor General in Council in this behalf.

If they fall under sub-section (2), the Chief Presidency Magistrate or D. M. has by order in writing, consented to the initiation of the proceedings.

Section 197

Prosecution of Judges, Magistrates and public servants for an offence alleged to have been committed by him, while acting or purporting to act, in the discharge of his official duty.

No Court shall take cognizance of such offence except with the previous sanction of the Local Government.

(2) Such Local Government may determine the person by whom, the manner in which, the offence or offences for which, the prosecution of such Judges, etc ... is to be conducted, and may specify the Court before which the trial is to be held.

Section 198

Prosecution for breach of contract or defamation, or offences against marriage. No cognizance except upon a complaint made by some person aggrieved by such offence. Proviso : in certain cases some other person may with the leave of the Court, make a complaint on his or her behalf.

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* Inserted—ed.

Section 199

Prosecution for adultery or enticing a married woman : No cognizance except upon a complaint made by the husband of the woman, or in his absence, made with the leave of the Court," by some person who had care of such person on his behalf at the time when such offence was committed.

POLICE REPORT

I. How does it originate ?

It originates in what is known as the first information. Information is usually given by the aggrieved party. But it may be given by any party. Even a police officer may give such information based on his knowledge. Not only that but in certain cases the law compels certain persons to give information.

Section 44.

Every person shall give information to the Magistrate or Police of certain offences.

Section 45

Information given to the police may refer to a cognizable offence or to a non-cognizable offence.

Congnizable offence is one in which the police can arrest without a warrant.

Non cognizable offence is one in which the police cannot arrest without a warrant.

Section 154

Information relating to a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant and every such information whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it and the substance of it shall be entered in a book to be kept by such officer in such form as the Local Government may prescribe in this behalf.

Section 155

Information relating to non-cognizable offence

He shall enter in a book to be kept the substance of such information and refer the informant to the Magistrate.

Section 155

No police-officer shall investigate a non-coginzable case, without the order of a Magistrate of the 1st or 2nd class having power to try such case or commit the same for trial, or of a Presidency Magistrate.

Section 156

Any officer in charge of a police-station may, without the order of a Majistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station, would have power to inquire into.

The police report which can be the basis of action by a Magistrate, is based upon information relating to a cognizable offence.

Section 157

If, from information received i.e. under Section 154, the officer has reason to suspect the commission of a cognizable offence then ;

(1) He shall send a report of the same to a Magistrate empowered to take cognizance of it.

(2) Shall proceed to the spot to investigate the facts and circumstances of the case

and

(3) take measures, if necessary, for the discovery and arrest of the offender.

Provided

(a) that the informant gives the names of the offender and the case is not of a serious nature, the officer need not proceed in person to make an investigation on the spot.

(b) that if the officer thinks, there are no sufficient grounds for entering on an investigation, he shall not investigate the case.

He shall state in his said report his reasons for not complying fully with the requirements of the Section.

He should notify to the informant that he will not investigate the case or cause it to be investigated. But this withdrawl of the police cannot block the prosecution of the offender. They are two ways yet open.

Section 159

I. The Magistrate, on receiving such report, may direct an investigation or may at once proceed and ask subordinate Magistrate to hold a preliminary inquiry into or otherwise dispose of the case in manner provided by the case.

This is a preliminary report before completion of the investigation. The Magistrate can act under Section 159. But if the report is submitted *after investigation,* the Magistrate is not empowerd to act under this Section.

II. The aggrieved party may move.

If the police do not move, then they have the following powers ;

Section 160

(1) to require attendance of witnesses by an order in writing.

Witnesses are not required to tell the truth under this Section. If they give false testimony they cannot be prosecuted.

They don't sign it.

It is made before police.

Section 161

Police may examine witnesses acquainted with the facts of the case.

(2) Such witnesses shall be bound to answer all questions put to them, unless the question incriminates them.

Although Police can take statements from witnesses yet

Section 162

(a) they shall not be signed by them,

(b) they shall not be made use of at any inquiry or trial, in respect of any offence under investigation at the time when such statement was made.

Provided that, on the request of the accused, the Court shall refer to such writing and direct that the accused be given a copy thereof for contradicting such witness, provided that Court may exclude that part which is irrelevant or its disclosure is inexpedient with interests of the public or does not promote the ends of justice.

In short, they do not form evidence which can be said to be admissible.

If such statements are to be treated as evidence, then they must be recorded by Magistrates and not Police Officers. Consequently provision is made in the Criminal Procedure Code.

Section 164

Any Presidency Magistrate, Magistrate 1st class and Magistrate of the Second class especially empowered may, if he is not a police officer

record any *statement or confession* made to him in the course of an investigation under this chapter.

Statement shall be recorded in a manner prescribed for recording evidence.

Confession is to be recorded in the manner provided for in Section 364.

Provided that the Magistrate, before recording such confession, shall explain to the accused that he is not bound to make it and if he does so it may be used as evidence against him.

No Magistrate shall record, unless he has reason to believe, that it is made voluntarily.

On recording confession, Magistrate shall make a memorandum at the foot showing that he has observed the conditions.

Search

Section 165

(1) In the course of his investigation, a police officer may find it necessary to make a search in any place.

Such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search or cause search to be made, for such thing in any place within the limits of that station in his charge.

(2) The police officer shall, as far as possible, conduct the search in person.

(3) He may authorize his subordinate after recording reasons in writing and specifying the place and thing to be searched.

(4) The provisions of the Code, as to search warrants and the general provisions as to searches contained in Section 102 and Section 103, shall apply.

(5) Copies of record made during search shall be sent to the nearest Magistrate and the owner or occupier of the place of search shall be given a copy of the record on payment of fees.

Section 166

Police officer can cause search to be made within the area of another police station.

Section 167

If the investigation cannot be completed within 24 hours fixed by Section 61, and *there are grounds for believing that the accusation or information is well founded,* the Police shall forthwith transmit to the nearest Magistrate, a copy of the entries in the diary hereinafter prescribed relating to the case and shall, at the time, forward the accused to such jurisdiction.

(2) The Magistrate shall, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit for a term not exceeding 15 days.

(3) A Magistrate authorising detention in police custody shall record reasons for so doing.

Section 169

When police officer finds that there is not sufficient evidence or reasonable ground of suspicion to justify forwarding the accused to Magistrate *he shall release him* on his executing a bond with or without sureties *to appear if and when so required* , before a Magistrate empowered to take cognizance.

Section 170

(1) When police officer finds that there is sufficient evidence or reasonable ground, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance.

(2) Along with this, he shall send article necessary to be produced before Magistrate and shall require complainant and witnesses, to execute a bond to appear before Magistrate.

Section 173

The police officer shall send a report giving names of parties, information each is responsible for.

Accused is entitled to a copy of the report.

Exemption of accused from attendance.

Section 205 ; 366 ; 424 ; 6 *All. 59 : 21 Cal. 588*

Section 205.—Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.

(21) But the Magistrate may call accused at any time.

Section 366.—Time of Judgement.

Should be read in the presence of the accused unless it is dispensed with and the sentence is of fine only.

Section 424.—Judgement by appellate Court.

Accused need not be called to hear judgement.

II. Of how many offences can the Court take cognizance of at one trial

Joinder of Charges

Sections 233, 234, 235

Section 233.

1. *Every offence shall be tried separately.*

A is accused of theft on one occasion and of causing grievious hurt on another occasion. A must be tried separately for the two offence. He cannot be tried for both at one trial. There are exceptions to this general proposition.

Section 234

Three offences *of the same kind* may be tried at one trial *if they are committed within the space of twelve months,* irrespective of the question whether they are committed against the same person or not.

Offences of the same kind = Offences punishable with the same amount of punishment under the same section of the I. P. C. or of any special or local law.

2. *Must not exceed three.* Joinder of charges of three of fences under section 411 and three offence sunder 414 is bad. Three offences of forgery and three offences of breach of trust bad.

1. *Same kind.*	Adultery and bigamy Murder and hurt Forgery and giving false evidence	not same

The rule as to kind is subject to two proviso.

(1) Offences under Section 379 (Theft) and under Section 380 (Theft in a dwelling house) shall be deemed to be offences of the same kind even though they are not offences under the same section and the punishment for them is not identical.

(1) The offence and the attempt to commit that offence (Section 511 I. P. C.) shall be deemed to be offences of the same kind even though they are not offences under the same section and the punishment for them is not identical.

Section 235 (2)

When an act constitutes an offence under two or more separate definations of any law defining or punishing offences the person accused of them may be tried at one trial for each of such offences.

Section 235 (3)

When an act, which by itself constitutes an offence, constitute when combined with another a different offence.

The person accused of them may be tried at one trial for the offences, constituted by such act when combined, and for any offences constituted by the act when taken by itself.

This is so when the act or acts done by the accused constitutes a single offence.

But it may be, that the acts done by the accused constitute more than one offence i.e. show that a plurality of offences have been committed.

Can the accused be tried for all such offences at one trial ? Or must he be tried separately for each offence ?

The rules as to this will be found in *Section 235 (1)*

If the acts amounting to different offences are committed by the accused in the course of the *same transaction,* then he may be tried at one trial for *every* such offence.

1. *Same transaction*

In deciding whether acts constituting an offence are so connected as to form one and the same transaction, the determining factor is not so much proximity in time as continuity and community of purpose and object.

A mere interval of time between the commission of one offence and another does not by itself import want of continuity, though length of interval may be an important element in determining the question of connection between the two.

2. There is no limit to the number of offences that can be tried together.

III. Of how many offenders can the Court try at one trial

Joinder of Accused

Section 239

The following persons may be charged and tried together :

(a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;

(c) persons accused of more than one offence of the same kind within the meaning of Section 234 *committed by them jointly* within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, or criminal misappropriation,

and

(f) persons accused of receiving or retaining, or assisting in the disposal or concealment of property, the possession of which is alleged to have been transferred by any such offence committed by the first-named persons,

or

persons accused of abetment of or attempting to commit any such last-named offence.

(f) persons accused of offences under sections 411 and 414 of the I. P. C. or either of those sections in respect of stolen property, the possession of which has been transferred by one offence.

(g) persons accused of any offence under Chapter XII of the I. P. C. relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence.

NOTE.—The foundation for the procedure of joint trial of different persons is their association from start to finish to attain the same end.

The fact that they carried out their scheme by successive acts done at intervals does not prevent the unity of the project from constituting the series of acts one transaction i.e. the carrying through of the same object which they had from the first act to the last.

20 cal. 358

5 Mad. 199

IV. Securing the presence of the accused and the witness

Although the Court has taken cognizance of an offence, the actual criminal proceedings can commence only when *the accused* and the witnesses are present in Court, the one to answer the charge and the other to give evidence.

How are they to be brought before the Court ?

Section 104

I. When cognizane is taken on police report based on investigation conducted under Section 173, the accused and witnesses are already before the Court.

II. When cognizance is taken otherwise than on police report under Section 173, the accused and the witnesses are not before the Court. They have to be brought before the Court.

What is the process for bringing them before the Court ?

The Criminal Procedure Code contemplates two such processes.

Section 68

I. Summons to appear and II. Warrant to arrest

Section 68

I. Summons to appear

Every summons issued by a Court under this Code shall be in *writting* in *duplicate, signed and sealed* by the *presiding officer* of such Court or by such other officer as the High Court may, from time to time by rule direct.

(2) Summons shall be served by a police-officer, or, subject to such rules as the Local Government may prescribed in this behalf, by an officer of the Court issuing it or other public servant.

Section 69

Personal Service

(1) Summons shall if, practicable, *be served personally* on the persons summoned, by delivering or tendering to him one of the duplicates of the summons.

(2) Every person served with summons shall, if so required by the serving officer, *sign a receipt* therefor on the back of the other duplicate.

(3) *Service on Corporations*

Service on incorporate company or other body corporate may be effected by serving it on the *Secretary, local manager or other principal officer of the corporation in British India.* In such case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

Section 70

Service when person cannot be found may be served by leaving one of the duplicates for him with some adult male member of his family, or, in a Presidency-town, with his servant residing with him.

The *person with whom* it is left, shall sign on the back of the duplicate.

Substituted service is improper where sufficient steps are not taken to serve accused personally.

69 J. C. 627.

Section 71

If this is not possible, then the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides.

Section 72

Service on a Government Servant or of Railway Company.

Where person summoned is in the active service of the Government or of a Railway Company, the Court issuing the summons shall ordinarily *send it in duplicate to the head of the office in which such person is employed*; and such head shall thereupon cause the summons to be served in manner provided by Section 69 and shall return it to the Court under his signature with the endorsement required by that Section.

(2) Such signature shall be evidence of due service.

Section 73

Service of summons out of local limits.

When a Court desires that a summons issued by it shall be served at any place outside the local limits of its jurisdiction, *it shall ordinarily send such summons in duplicate to a Magistrate within* the local limits of whose jurisdiction the person summoned resides or is, to be there served.

Section 74

Proof of service in such cases when serving officer is not present.

(1) An affidavit, purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to be endorsed (in the manner provided by S. 69 or S. 70) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved.

(2) The affidavit mentioned in this section may be attached to the duplicate of the summons and returned to the Court.

Service on pleader is not sufficient.

6 C.W.N. 927

Copy should be served and it is not enough merely to show it.

5 *B. H. C. R. 20.*

Tender amounts to service if summons is refused.

28 M. L. F. 505.

Refusing to *receive* summons is no offence.

II Warrant of Arrest

Section 75

(1) Shall be in *writing, signed* by the Presiding Officer, or in the case of a Bench of Magistrates, by any member of such Bench and shall bear the seal of the Court.

Warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

(2) **Difference between Summons and Warrant.**

Summons is an order to the person to be summoned.

Warrant is *not* an order to the person to be arrested. Therefore a person can be punished for disobedience of a summons. But he cannot be punished for a disobedience of a warrant.

5 W.R.ed. 71.

Section 76

Court may direct Security to be taken.

(1) The Issuing Court may in its discretion direct by endorsement on the warrant that, *if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.*

(2) The endorsement shall state.

(a) The number of sureties;

(b) The amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound; and

(c) The time at which he is to attend before the Court.

(3) Whenever security is taken under this section, the officer, to whom the warrant is directed, shall forward the bond to the Court.

Section 77

(1) *Warrant to whom directed.*

Warrant shall ordinarily be directed to one or more police-officer, and when issued by a Presidency Magistrate, shall always be so directed; but any other Court issuing such a warrant may, if its immediate execution is necessary and no police-officer is immediately available, direct it to any other person or persons; and such person or persons shall execute the same.

(2) *Warrant addressed to more than one person.*

May be executed by all or by any one or more of them.

Section 78

(1) *Warrant may be directed to Land holder, farmer, or manager of land,*

for the arrest of (1) any escaped convict, (2) proclaimed offender, or (3) person who has been accused of a non-bailable offence, and who has eluded persuit.

(2) Who shall sign it and execute it, if the person is on the land under his charge.

(3) On arrest the person shall be made over to the nearest police station.

Section 79

A police officer to whom a warrant has been addressed may endorse it on to another police officer to execute.

Section 80

Arresting party shall notify the substance of the warrant to the person arrested.

Section 81

Subject to the provisions of Section 76 as to Security, the arresting party shall without unnecessary delay, bring the person arrested before the Court before which he is required to produce him.

Section 82

Warrant of arrest may be executed at any place in British India.

Section 83

When warrant is to be executed *outside the local limits of the jurisdiction of the Court issuing the same, such Court may, instead of directing such warrant to a police officer, forward the same by post or otherwise to any Magistrate, or District Superintendent of Police, or the Commissioner of Police in a Presidency town,* within the local limits of whose jurisdiction it is to be executed.

(2) The Magistrate or D. S. P., or Commissioner whom such warrant is so forwarded, shall endorse his name thereon, and if practicable, cause it to be executed in manner hereinbefore provided, within the local limits of his jurisdiction.

Section 84

When a warrant directed to a police-officer is to be executed outside the jurisdiction, he shall ordinarily take it for endorsement either to a Magistrate or to a police officer not below the rank of an officer in charge of a station within the limits within which the warrant is to be executed.

(2) Such Magistrate or police officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police officer to whom the warrant is directed to execute the same.

(3) If the obtaining of endorsement is likely to cause delay, it may be executed without endorsement.

Section 85

When arrest is made outside, the person arrested shall be taken to the Magistrate, D. S. P., Commissioner of Police.

Section 86

They shall then direct his removal in custody to the Court issuing the warrant

Effect of Non-execution of the warrant of arrest.

Section 87

If the person is absconding, such Court may publish a written proclamation requiring him to appear at a specified place and at a specific time not less than 30 days from the date of publishing such proclamation.

(2) How to publish the Proclamation.

(a) It shall be read in the place in which he ordinarily resides.

(b) It shall be affixed to some conspicuous part of the house in which he resides.

(c) A copy of it affixed to the Court house.

Section 88

The Court issuing a proclamation under Section 87 may at any time order the attachment of any property moveable or immoveable or both, belonging to the proclaimed person.

(2) Such order shall authorize the attachment of any property belonging to such person within the district in which it is made.

Section 89

Restoration of attached property

If the person *appears* within 2 years after the date of the order of attachement and satisfies (1) That he did not abscond or conceal himself *and* (2) that he had not such knowledge of the proclamation as to enable him to appear within time—

Section 90

Against whom can Warrant be issued ?

Ordinarily, one would imagine, that it can be issued only against the accused. But that is not so. The law is that warrant can be issued against any person against whom a summons can be issued except a juror or assessor.

This means that a warrant may be issued even against a witness.

Provided:

(1) The Court sees reason to believe before the time for appearance that he has absconded or will not obey the summons ; or

(2) That at such time he fails to appear, and the summons is shown to have been duly served to enable him to appear in time but he does not appear.

Safeguard for continued presence of the Parties called before Court by due process

Section 91

When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant is present in such Court, *such officer may require such person to execute a bond with or without sureties for his appearance in such Court.*

Section 92

When any person who is bound by any such bond does not appear, the officer presiding may issue a warrant directing that such person be arrested and produced before him. Besides, the necessity of having before the Court the *complainant, the accused* and *the witnesses.* There is also the necessity having before the Court the *Corpus deticti,* which are the subject matter of the accusation or things which are necessary to prove the accusation.

Forged document, person confined

We must therefore consider the rules relating to the production of these.

I. Production of a document or a thing.

Section 94

Whenever any Court considers the production of any document or thing is necessary or desirable for the purpose of investigation, inquiry or trial or other proceedings before such Court, he may issue a summons to the person in whose *possession or power* such document or thing is believed to be, requiring him to attend and produce it, at the time or place stated in the summons.

(2) When the summons is merely to produce, he need not attend. Sufficient if he sends it.

* * * * * *

(Earlier part is not found—ed.)

Officer or Judge or in his presence and hearing under his personal direction and superintendence and shall be signed by the Magistrate or Sessions Judge.

In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

Section 363

Sessions Judge and Magistrate shall also record remarks regarding demeanour of the witnesses whilst under examination.

Section 360

As the taking down of the evidence of each witness is completed, it *shall* be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objections made to it by the witness and shall add such remarks as he thinks necessary.

Omission to read over is an illegality.

II. Before Presidency Magistrates

Section 362

Appealable cases and non-appealable cases.

In appealable cases

The Magistrate shall take down the evidence of the witnesses with his own hand, or cause it to be taken down in writing from his dictation in open Court.

All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

The Magistrate shall make a memorandum of the substance of the examination of the accused. Such memorandum shall be signed by the Magistrate with his own hand, and shall form part of the record.

In non-appealable cases

It shall *not be necessary* for a Presidency Magistrate to record the evidence or frame a charge.

Section 359, 362(2),

Mode of recording Evidence

Evidence shall ordinarily be taken down in the form of a narrative, though the Court may in its discretion take down, or cause to be taken down, any particular question and answer.

Exception : Examination of the accused.

Section 364

The whole of such examination, including every question put to him and every answer given by him, shall be recorded in full.

This does not apply to the record of the examination of the accused by the High Court.

II. Record in Summary Trials

Section 260

1. The District Magistrate.

2. *Magistrate 1st class* especially empowered in this behalf by the Local Government.

3. Any Bench Magistrate invested with 1st class powers and especially empowered in this behalf by the Local Government may, if he thinks fit, try in a *summary* way all or any of the following offences:—

(a) Offences not punishable with death, transportation or imprisonment for a term exceeding six months and certain other offences mentioned in the Section.

Cases which can be tried summarily may be appealable or non-appealable.

Section 263

But they shall enter in such form as the Local Government may direct the following particulars.

(a) The serial number.

(b) The date of the Commission of the offence.

(c) The date of the Report or Complaint.

(d) The name of the complainant (if any).

(e) The name, parentage and residence of the accused.

(f) The offence complained off and the of fence (if any proved) and the value of the property in respect of which the offence is committed.

(g) The plea of the accused and his examination if any.

(h) The finding and in conviction brief statement of the reasons for it.

(i) Sentence or other final order; and

(j) The date on which the proceedings terminated.

In appealable cases.

Section 264

Before passing sentence the Court* shall record a judgement embodying the substance of the evidence and also the particulars required in non-appealable cases.

Such judgement shall be the only record in appealable cases.

Judgement

Section 366

The judgement in every trial in any Criminal Court *shall be pronounced,* or the substance of such judgement shall be explained;

(1) In open Court, either immediately or in subsequent date to be notified.

Provided that the whole shall be read if requested by the parties.

(2) The accused shall, if in custody, be brought up and if not in custody be brought up to hear judgement delivered.

Except where his personal attendance has been dispensed with and the sentence is of fine only or he is acquitted.

N. B.— (3) Judgement shall not be read if delivered in absence.

* Inserted—ed.

Section 367

Every judgement unless otherwise provided *shall be written* by the presiding officer of the Court or from his dictation.

Shall contain

(1) Point or points for determination

(2) The decision thereon and

(3) The reasons for the decision

(4) Shall be dated and signed by the Presiding officer in open Court at the time of pronouncing it, and where it is not written by the Presiding officer with his own hand, every page of such judgement shall be signed by him.

(5) It shall specify the offence (if any) of which, and the Section of the I. P. C. or other law under which the accused is convicted, and the punishment to which he is sentenced.

(6) When the conviction is under the I. P. C. and it is doubtful under which of the two parts of the same section of that Code the offence falls, the Court shall directly express the same and pass judgement in the alternative.

(7) If it be a judgement of acquittal it shall state the offence of which he is acquitted and direct that he be set at liberty.

(8) If the accused is convicted of offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall give reasons.

Provided that in trials by jury, the Court need not write a judgement but the Court of Session shall record heads of charge.

Section 368

When sentence of death—sentence shall direct that he be hanged by the neck till he is dead.

Section 369

Alteration of judgement

Save as otherwise provided by the Code or other law or in the case of the High Court, no Court, when it has signed its judgement, shall alter or review the same except to correct a clerical error.

(Even the High Court has no power.)

Section 370

Judgement by a Presidency Magistrate

Instead of recording a judgement in the above, a Presidency Magistrate shall record the following particulars :

(a) Serial number.

(b) The date of the commission of offences.

(c) Name of the complainant (if any).

(d) Name of the accused and (except in the case of European British subject) his percentage and residence.

(e) The offence complained of or proved.

(f) Plea of the accused and his exam (if any).

(g) Final order.

(h) Date of such order.

(i) In all cases, where the sentence is imprisonment or fine exceeding 200 or both, a brief statement of reasons for the conviction.

Section 371

Copy of judgement to be given to accused without delay

In cases other than summons cases it shall be given free of cost.

In trials by jury, a copy of heads of charge by the jury shall be given to him.

In sentence of death, shall inform the accused of the period of limit for appeal.

Section 373

Court of Session to send copy of finding and sentence to the District Magistrate.

Criminal proceedings other than trial of an offender

I. Those dealing with keeping of peace and maintening good order.

II. Those dealing with the enforcement of certain obligations. Family obligation and public nuisance.

III. Those dealing with the maintenance of public peace.

I. THOSE DEALING WITH THE PUBLIC ASSEMBLY—KEEPING OF PEACE AND MAINTAINING ORDER.

It is better to prevent crime than only to punish it when it is committed.

This theory is not accepted universally. Attempt to prevent crime may involve undue interference in the liberty of the individual.

English theory is inclined towards the view that the state should intervene only when the conduct of an individual amounts to a crime.

E. g.—English law of sedition, assembly.

On the other hand, the Indian Law takes a different view. E. g. Press Act, Public Meetings Act.

That being so, the Criminal Procedure Code enacts certain Sections to enable the Criminal Courts to prevent the commission of offences.

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* * * *

Chapter VIII deals with offences against public tranquillity.

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* * * *

The Court Contemplates the following usage fit for such preventative or anticipatory action.

1. There are quarrelsome people in every country in the world, and there are some quarrels which may lead to violence and even to serious crime.

2. In the same way certain forms of propaganda, if carried on without any restraint, may induce ignorant persons to do harmful things, they may be circulating falsehoods, or even more deadly half-truths, cause ignorant persons to believe, to act upon the belief, that malicious designs are being entertained which in fact are not entertained by any one.

3. Again there are those who prefer a life of idleness, varied by occasional crime when detection seems unlikely, to one of honest work. There are also persons who live mainly on the proceeds of crime committed by themselves, or on a share of the proceeds of crime committed by others, whom they help to escape detection, or assist by setting up an organization which affords its supporters both opportunity to dispose of the proceeds of their dishonesty and a fair prospect of immunity from punishment.

4. Habitual Offenders.

Section 183

9. Where an offence is committed while the offender is on a journey or voyage, the offence may be inquired into or tried by a Court through or into the local limits of whose jurisdiction

the offender or the person against, whom or the thing in respect of which the offence was commuted	passed in the course of that journey or voyage.

Section 184

10. All offences against the provisions of any law for the time being in force relating to Railways, Telegraphs, the Post office, or Arms and Ammunitions, may be inquired into and tried in a Presidency Town.

Section 185

11. In cases of doubt, High Court to decide upon which Subordinate Court is to have jurisdiction.

Where two or more subordinate Courts, *not* subordinate to the *same* High Court, the High Court within whose appellate Cr. Jurisdiction the proceedings were *first* commenced, may decide and give directions.

Section 186

12. When a Presidency Magistrate, District Magistrate or Sub-Div. Magistrate or a Magistrate of the 1st Class especially empowered by Local Government sees reason to believe that any person within the local limits of his jurisdiction has committed an offence *without* such local limits (within or without British India) an offence which *cannot* be inquired into or tried within such local limits, but which by some law for the time being in force, be inquired into or tried in British India.

Such Magistrate may inquire into the offence and compel such persons to appear and send him to a Magistrate having jurisdiction.

Offences committed outside British India

So far we have dealt with offences committed *within the limits* of British India. Suppose now that although the offender is within British India but the offence is committed outside British India, how is the situation to be dealt with?

It may be dealt with in two ways—

I. The offender may be sent up for trial in the country where the offence was committed.

II. The offender may be tried in British India. The first is known as dealing in *extradition*. The second may be called dealing in ex-territorial jurisdiction.

I. Extradition out side India may be to any—

(a) Native State

(b) Foreign State

(c) His Majesty's Dominions.

(a) *Native State*

Extradition to a Native State is governed by the Indian Extradition Act of 1903.

* * * *

Having regard to the Statutes of Parliament and the Acts of the Indian Legislature I make the following geographical divisions of this globe for the purpose of jurisdiction of the secular Courts:

(1) Territorial divisions of land and foreign country governed by the Cr. P. C. and other enactments of the Indian Imperial Legislature.

(2) Territorial waters governed by Statutes 41 and 42 *Vic. C. 73.*

(3) High seas governed by statutes 12 and 13 *Vic. C. 96* (admiralty offence (colonial) 23 and 24 *Vic. C. 88 and 37 and 38 Vic. C.* 2. It would thus be seen that the offences on high seas are governed only by the Statutes of Parliament 12 and 13 Vic. confer on colonial courts to try all offences which could have been tried by the admiral. Section 1 of statute 23 and 24 Vic. C. 88 makes statute 12 and 13 Vic. C. 96 applicable to India and Statute 37 and 38 Vic. C. 27 makes the offence punishable according to Indian Law.

19 Bom. L. R. 527

India. Defined in Section 3 (27) of the General Clauses Act X of 1897.

> "India shall mean British India together with any territories of any native Prince or Chief under the *Suzerainty* of H. Majesty exercised through the G. G. of India or other officer subordinate to the G. G. of India."

British India. Defined in Section 3 (7) of the General clauses Act X of 1897

> "Shall mean all territories and places within H. M's dominions which are for the time being governed by H. M. through the G. G. of India or through any Governor or other officer subordinate to the G. G. of India."

British India = B. I. + 3 miles

8 Bom. H.C.R. Cr. C 63.

* * * *

Who are liable to be tried for offences under the Penal Code ?

Section 3 I. P. C. Any person liable by any law passed by the Governor-General of India in Council to be tried for an offence committed beyond the limits of the said territories, shall be dealt with according to the provisions of this Code for any act committed beyond the said territories in the same manner, as if such act had been committed within the said territories.

Section 4 I.P.C. The provisions of this Code apply also to any offence committed by—

> (1) Any native Indian subject of H.M. in any place without and beyond British India.
>
> (2) Any other British subject within the territories of any Native Prince or Chief in India.
>
> (3) Any servant of the Queen whether a British subject or not within the territories of any Native Prince or Chief in India.

Explanation. In this section the word *offence* includes every act committed outside British India which, if committed in British India, would be punishable under this Code.

Section 7(1) of the Act

Under this section the Political Agent for such a State may demand by a warrant addressed to the D. M. or the Chief Presidency Magistrate the surrender of an offender. Provided that offender is not a European British subject and the offence is such as is described in the 1st schedule of the Indian Extradition Act.

Section 10

Magistrates in British India may, of their own motion and without requisition, issue warrant of arrest on satisfactory information, or complaint, and surrender the offender to the State within whose jurisdiction he has committed the offence.

N. B.—This Act is subject to treaty rights and the special provisions for extradition conserved by them.

Extradition is governed by the Extradition Act

(b) *Foreign State.—The scene of offence.*

In the case of a Foreign State to which English Extradition applies, the offender may be surrendered on requisition to such foreign State. Provided :

(i) The Government of India or the Local Government thinks fit,

(ii) If the offence is one mentioned in the 1st Schedule of the Indian Extradition Act, and

(iii) If the offence is not of a political nature.

(c) *Dominions.* The scene of offence.

Extradition is governed partly

(i) by the Fugitive Offender's Act, 1881 (Parliamentary Statute) and partly.

(ii) by the Indian Extradition Act.

All criminal jurisdiction is local: the jurisdiction of the crime belongs to the country where the crime is committed.

L.R. (1891) A. C. 458.

Crime is purely local i. e. depends on the law of the place in which it is committed, and not on nationality of the person who commits it.

L.R. (1894) A.C.670.

British Indian Courts have no jurisdiction to try a foreigner for offences committed and completed outside British territory. No foreign subject can be tried in British India for an offence committed outside British India. *28 All 372 :2 Bombay. L. R. 337.* Where a subject of the Native State committed theft in that State, and was subsequently found in British India in possession of the stolen property, the British Indian Court had no jurisdiction to try him for the offence of theft. It had however jurisdiction to try him for retaining stolen property. *10 Bombay 186.*

Found = does not mean where a person is discovered, but where he is actually present, whether he comes of his own accord or is brought under arrest.

6 Bombay 622.

A trial under this section will not be vitiated by reason of the fact that the accused has been brought into British India from a foreign territory under an illegal arrest.

13 Bombay L. R. 296.

Section 106 and 107 deal with dangerous quarrels.

Section 106 deal with the following cases :

Any person accused of any offence punishable under Chapter VIII of the Indian Penal Code, other than offences punishable under Sections 143, 149, 153-A and 154, or of assault, or, other offence *involving a breach of the peace,* or of abetting the same, or any person accused of committing criminal intimidation is convicted and such Court *is of opinion* that it is necessary to require such person to execute a bond for keeping the peace, such Court may, at the time of passing sentence on him, order him to execute a bond for a sum proportionate to his means, with or without sureties, for keeping the peace during such period, not exceeding three years, as it thinks fit to fix.

2. If conviction is set aside on appeal or otherwise, the bond so executed shall become void.

3. High Court in revision may demand security.

NOTES.—Involving breach of the peace.

Two interpretations

1. These words refer to offences in which a breach of the peace is an essential ingredient and not to offences which merely provoke or are *likely t*o lead to a breach of the peace.

30 Cal. 366. 47 Mad. 846 (848)

2. These words include offences where a breach of peace is *likely* to occur.

This is the view of the Bombay and the Allahabad High Courts. So that a bond in cases involving Section *504* I. P. C. (insult with intent to provoke a breach of the peace) as well as Section *448* I. P. C. (removal of a land mark) is good.

Section 107

Whenever a Criminal Court is informed that *any person who is likely to commit a breach* of the peace or disturb public tranquillity *or to do any wrongful act* that may probably occasion a breach of the peace or disturb public tranquillity, the Magistrate, if in his opinion there is sufficient ground for proceeding, may require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period *not exceeding one year* as the Magistrate thinks fit to fix.

NOTES

1. *Is informed.* The information must be reliable. A statement by a private person not upon oath or solemn affirmation is not credible information upon which alone a Magistrate can issue a summons under the section. The information must be of a *clear* and definite kind, directly affecting the person against whom process is issued, and should disclose tangible facts and details so that it may afford notice to such person of what he is to come forward to meet.

6 All. 26.

2. The act likely to cause a breach of the peace must be an *impending* one and not *likely to happen at some future time* ; it must be shown to be in contemplation at the time of the information given.

3. The act resulting in a breach of the peace must be *wrongful.*

Acts which amount to an exercise of lawful rights are not to be treated as wrongful acts necessitating an order under this Section.

An act which is lawful does not become unlawful because some persons oppose it.

Wrongful act means an act forbidden or declared to be penal or wrongful by the Criminal law, and not a mere improper act.

e. g. killing a cow.

singing of ballads in open streets.

saying Amin in a loud voice in prayers in a mosque.

Section 108 deals with dangerous propaganda.

It deals with

any person who, within or without such limits, either orally or in wrting or *in any other manner, intentionally* disseminates or attempts to disseminate, or in any wise abets the dissemination of,—

(a) Any seditious matter, i.e. any matter the publication of which is punishable under Section 174-A of the I. P. C.

(*b*) Any matter the publication of which is punishable under Section 153-A of the I.P.C., or

(*c*) Any matter concerning a judge which amounts to criminal intimidation or defamation under the Indian Penal Code.

Such Magistrate, if, in his opinion there is sufficient ground for proceedings, may require such person to show cause why he should not be ordered to execute a bond, with or without sureties for such period not exceeding one year as the Magistrate may think fit to fix.

NOTES.—

1. In any manner *e. g. by gramophone records.*

2. *Intentionally* would exclude innocent agents and ignorant tools *e. g.* newspaper boys and others merely handling.

3. Not writing but dissemination is necessary. When the matter is disseminated through a newspaper the Editor, proprietor, printer, or publisher shall not be proceeded against except by order of the Local Government.

Sections 109 and 110 deal with dangerous characters.

Section 109 deals with the following persons :—

(a) Person taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction and that there is reason to believe that such person is taking such precautions *with a view to committing any offence.*

(b) Person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself.

In these cases the bond may be for a year.

1. Concealing must be with a view to commit an offence.

2. Ostensible means of subsistence.

To be penniless or out of work is not to be without ostensible means of subsistence.

53 Cal. 347 Victor vis Emp.

Section 110 deals with the following cases of *habitual offenders.*

(1) *is by habit* a robber, house-breaker, thief or forger or

(2) is by habit a receiver of stolen property knowing the same to have been stolen or

(3) habitually protects or harbours thieves or aids in the concealments or disposal of stolen property or

(4) .....

In the case of habitual offenders the bond may be for 3 years.

Section 121

The method adopted to compel such persons to keep peace or be of good behaviour is to demand from them security to keep peace or behave for a certain period.

Difference between a bond for keeping peace and bond for keeping good behaviour

1. A bond for keeping the peace will not be forfeited by the commission of *any* offence ; but only by the commission of offences likely in their consequences to cause a breach of peace.

2. A bond for good behaviour will be forfeited by the commission of *any* offence punishable with imprisonment.

Procedure on breach of bond. When a person forfeits a bond by being convicted of an offence, the amount of the forfeited bond may be recovered, but he cannot be forthwith imprisoned for the unexpired portion of the term of security. The Magistrate's remedy is to take fresh proceedings under this chapter.

Magistrate is not justified in forfeiting a recognizance without giving the party charged with breach an opportunity to cross examine the witnesses upon whose evidence the rule to show cause has been issued.

The security may be a personal security with or without sureties.

The Magistrate has a right to define the class of sureties *e.g.* landholders, etc.

Section 122

A Magistrate may refuse to accept any surety offered, or may reject any surety previously accepted by him or his predecessor on the ground that such surety is an unfit person for *the purposes of the bond.*

There is to be inquiry into fitness.

Test of fitness is whether the surety can exercise proper control over the person who has been bound over. Mere pecuniary fitness is not the only test of his fitness. The object of requiring security is not to obtain money for the Crown by the forefeiture of recognisances, but to ensure that the accused should be of good behaviour.

Surety unfit if he were staying away.

According to the Bombay High Court it is sufficient if they are solvent and respectable.

22 Bombay L.R. 190.

Ability to control the accused is not a desirable condition.

Section 126

A surety may apply at any time for cancellation of his bond.

Liability of surety

Surety's liability arises on the breach of the bond which again depends upon the conviction of the principal.

Good behaviour and peace are general terms and include many offences. That being so, it would be unjust to hold that the surety is liable for every conceivable offence committed by the principal.

They indicate liability for such good conduct as indicated by the circumstances under which security was demanded.

Procedure

Section 112

When a Magistrate deems it necessary to require any person to show cause under such section, he shall make an order in writing

setting forth the substance of the information received; the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

Section 113

If the person is present in Court it shall be read over to him, or if he so desires the substance thereof shall be explained to him.

Section 114

If he is not present a summons shall issue.

If immediate breach of peace is feared warrant may issue.

Section 115

Copy of the order shall accompany the summons.

Section 116

Power to dispense with personal attendance.

Section 117

Inquiry as to the truth of the Information

When the person is present the Magistrate shall proceed to inquire into the truth of the information upon which *action has been taken,* and to take such further evidence as may appear necessary.

If action is taken under Section 107 the procedure shall be of a summons case.

If action is taken under Sections 108, 109, 110 it shall be as in warrant case except that no charge need be framed.

Pending inquiry, the Magistrate may, if he considers that immediate action is necessary for reasons to be recorded in writing, direct the person to execute a bond to behave until the conclusion of the inquiry.

Section 118

If upon such inquiry it is proved that bond is necessary, the Magistrate shall make an order accordingly.

Provided:

1. That the order shall not be different from that served upon the person

2. The amount of each bond shall not be excessive

3. If the person is a minor the bond shall be executed by his sureties only.

Section 119

If it is not proved that it is necessary for keeping peace or good behaviour, the Magistrate shall release him if he is in custody or discharge him after making an entry to that effect.

Is the person proceeded against an accused person ?

There is a difference of view on this question. In some cases it has been held that he is an accused person.

In other cases it has been held that he is not an accused person.

Bombay L.R. 27.

The sections itself are clear.

The deliberate use of such expressions the person, such persons, etc. and studiously avoiding the use of the word accused, the person informed against, the person called upon to show cause.

That being so, oath can be administered to him and examined and X-examined.

Section 120

The period of security shall commence on the expiration of sentence if one was being undergone at the time.

In other cases, it shall commence on the date of the order unless the Magistrate for sufficient reason fixes a later date.

Section 123

On failure to give security, he shall, if he is already in prison, be detained in prison, *until such period expires* or until within such period he gives the security to the Court or Magistrate who made the order.

2. When the period of security exceeds one year and there is a failure to give security, the Magistrate shall order to detain him in prison pending the orders of the Sessions Judge or High Court to whom the case is to be submitted.

The Sessions Judge or High Court may pass any order except imprisonment exceeding 3 years.

3. When the case of one is referred, the cases of others jointly tried is also referred. But me period of theirs shall not be increased.

Imprisonment

Simple for failure to give security for keeping peace.

Simple for good behaviour under Sections 108 and 109 and rigorous ..... under section 110.

Section 124

1. D. M. or Chief Presidency Magistrate may order any person failing to give security if he is of opinion that he may be released without hazard to the community or to any other person.

2. D. M. or Chief Presidency Magistrate may reduce the amount of security or the number of sureties or the time for which security has been required.

3. The release of a person may be conditional or unconditional.

The condition shall cease when the period expires.

The order of discharge may be cancelled if the condition is not fulfilled.

When conditional order of discharge is cancelled, such person may be arrested by any police officer without warrant and shall be produced before the D. M. or Chief Presidency Magistrate.

Unless then he gives security in accordance with the terms of the original order, the D. M. or Chief Presidency Magistrate may remand such person to prison to undergo such unexpired portion.

He may be released if gives security thereafter in terms of the original order.

Proceedings dealing with the enforcement of certain obligations

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Section 9 of the Fugitive Offenders Act, 1881

Mentions offences in which a fugitive offender from one dominion may be surrendered.

Section 19(d) of the Indian Extradition Act

Also mentions the offences in which an offender from a dominion may be surrendered.

Dealing in territorial jurisdiction

Instead of extraditing him, can he be tried in British India for the offence committed outside British India ?

Section 188

The answer is yes. Provided

1. That he is a Native Indian Subject of the H. M.

2. That he is a British Subject and has committed an offence in the territories of any Native Prince or Chief in India.

3. That he is a servant of H. M. (whether he is British Subject or not) and the offence is committed in the territories of any Native Prince or Chief in India.

4. That such offender is *found* in British India.

N. B.— S. 188 confers jurisdiction to try offences committed in *foreign territory,* but not on High Seas.

19 Bom. L. R. 527.

* * *

What is of which cognizance is taken ?

What the Court takes cognizance of is the offence, and not the fact that a particular person is alleged to have committed that offence.

Reasons

(1) When, during the course of proceedings which a Court has commenced by cognizance properly taken, it appears that a person or persons other than that or those alleged or appearing to be offenders when cognizance was taken also is or are offenders, then the Court can issue process against these new accused, and can deal with them just as it can issue process against and deal with the person or persons originally mentioned. (2) In fact, a Court can take cognizance even when the offender is absolutely unknown and can then issue process as soon as inquiry or investigation shows there is evidence justifying the placing of some person upon his trial. (3) Again, if a magistrate receives on transfer a case of which he could not have taken cognizance on his own authority, he can issue process against all whom the evidence at any stage shows to have probably been concerned as offenders.

Bars to cognizance

1. Section 337—approver.

III. *Powers of Criminal Courts*

The subject may be dealt with under three different heads.

(1) Power to take cognizance of an offence.

(2) Power to pass interlocutory orders in a criminal matter.

(3) Power to punish.

(I) *Power to take cognizance of an offence*

Whether a Court can take cognizance of an offence depends upon

(a) The Status of the Court.

(b) The nationality of the offender.

(c) Depends upon whether the accused will get justice at the hands of the Judge or Magistrate.

(a) *The status of the Court*

Section 6

According to the Criminal Procedure Code there shall be five classes of Criminal Courts in British India.

I. The Sessions Court.

II. Presidency Magistrate.

III. Magistrate of the first class.

IV. Magistrate of the second class.

V. Magistrate of the third class.

To this must be added the High Court.

(i) *Regarding offences under the Penal Code*

Section 28

1. The High Court may try any offence under the Indian Penal Code.

2. The Court may try any offence under the Indian Penal Code.

3. But with respect to other magistrates they can take cognizance of such offences only as they are empowered to do by the provisions contained in the 8th column of the Second Schedule to the Cr. P. C.

Section 29

(ii) *Regarding offences under other laws*

1. If the law mentions the Court no other Court can take cognizance of the offence.

2. If the law does not mention the Court then

(a) It may be tried by the High Court or

(b) It may be tried by the Court mentioned in the 8th column of the Second Schedule to the Cr. P. C. under the heading "Offences against other laws".

Section 29-A

(b) *The nationality of the offender*

If the offender is an *European British Subject* a magistrate of the 2nd or 3rd class cannot try him for an offence punishable otherwise than with fine exceeding Rs. 50.

If the offence is such that it is not punishable with imprisonment is punishable with fine and the fine does not exceed Rs. 50 then he can be tried by a magistrate of the 2nd or 3rd class.

But if it is punishable with imprisonment or is punishable with fine exceeding Rs. 50 he cannot be tried by them.

N. *B.*—This is so if the European British Subject claims his privileges as such given to him by the *principle of ultra vires an intra vires.*

Prior to 1923 the definition stood as follows :

European British Subject means (i) any subject of H. M. born. naturalized or domiciled in the U. K. or any of the European, American or Australian colonics or possessions of H. M. or in the colony of New Zealand or in the colony of the Cape of Good Hope or Natal; (ii) any child or grand-child of such person by legitimate descent.

Domicile = The place where a person has his *home* a place to which one returns.

Domicile is of three sorts :

(1) by birth

(2) by choice

(3) by operation of law (e. g. wife acquiring the domicile of her husband).

Section 195 deals with offences affecting the administration of justice.

General Rule

A magistrate cannot convict a person for contempt of Court committed in respect of his own authority a commitment to another magistrate is necessary. The Court before which an offence was committed, and by which a preliminary inquiry was held under Section 476 should not try the case.

Section 480

Court can try an offence committed in the view of the Court when the offence is

175 (Omission to produce a document by person bound to produce to a public servant)

178 (Refusing to take oath or affirmation)

179 (Refusing to answer public servant authorized to question)

180 (Refusing to sign a statement)

228 (Intentional insult or interruption to public servant sitting in judicial capacity).

Section 485

Imprisonment of 7 days or committal of a witness refusing to answer or produce a document.

For a convenient summary of the privileges formerly enjoyed by an European British Subject and privileges which he now enjoys *see* Woodroffa Criminal Procedure (1926) pp. 516—519.

Section 4 (I) *European. British Subject* means

(I) Any subject of H. M. of *European descent in the male line born,* naturalized or domiciled in the British Islands or any colony, *or*

(II) Any subject of H.M. who is the child or grand-child of any such person by legitimate descent.

Essentials of clause 1.—

1. European descent
2. In the male line
3. Born / naturalized / domiciled. | in the British Islands or any colony.

Essentials of clause 2. —Person may not himself be born naturalized or domiciled. But he may be the son of such a person. A person claiming the privileges of a European British Subject *under clause 2* must prove

1. Legitimate descent and

2. *Nationality* of his father or grandfather.

6 M. H. C. R.,7

Turnbull

* * *

(III) Depends upon whether the accused will get justice at the hands of the Judge or magistrate. There is very little chance of justice being done if the judge or magistrate is himself the complainant. The principle of law is that in no case shall the prosecutor shall also be the judge. This principle is embodied in .....

Section 487

(1) Except as provided in Sections 480 and 485 *no judge* of a criminal court *or magistrate,* other than a Judge of a High Court, *shall try* any person for any offence referred to in Section 195, *when such offence is committed before himself or in contempt of his authority or is brought under his notice (as such judge or magistrate)* in the course of a judicial proceeding.

(2) Nothing in Section 476 or Section 482 shall prevent a magistrate empowered to commit to the Court of Session or High Court from himself committing any case to such Court.

NOTES.—

Section 195 deals with offences affecting the administration of justice.

The section says that such an offence *if it has been committed before the judge* or in contempt of his authority is brought under his notice shall not be tried by him.

Unless the case falls under Sections 480 and 485.

Contempt is any act done or writing published calculated to bring a court or a judge of the court into contempt or to lower his authority or to obstruct or interfere with the due course of justice or the lawful process of the court.

(Navianbeg. 10 B. H. C. R. 73)

JUDGE.—Insertion of this word in lieu of the word 'Court' in the Code of 1872 makes the disqualification personal and the successor in office of the particular officer can therefore, now hold such trial.

MAGISTRATE.—Includes a Presidency Magistrate.

12 C. W. N. 246.

Trial includes hearing of an appeal.

AS SUCH JUDGE OR MAGISTRATE.—That means he cannot try it in his capacity as a judge or magistrate of the Criminal Court. If the same matter had come before him in another capacity he can try.

Sameness of the individual as distinct from the sameness of capacity. The Section is based on sameness of capacity.

16 Cal.776 of B.

18 Bom. 380 of B.

Contra.—1 Mad. 305-Disqualification based on sameness of the individual.

Section 556

No judge and magistrate shall, except with the permission of the Court to which an appeal lies from his court, try or commit for trial any case to or in which he is a party, or personally interested, and no judge or magistrate shall hear an appeal from any judgement or order passed or made by himself.

Explanation.—A judge or magistrate shall not be deemed a party, or personally interested, within the meaning of this section, to or in any case by reason only that he is a municipal commissioner or otherwise concerned in a public capacity, or by reason only that he has viewed the place in which an offence is alleged to have been committed or any other place in which any other transaction material to the case is alleged to have occurred, and made an inquiry in connection with the case.

Party

Personally interested do not imply mere intellectual interest. It implies something of the nature of an expectation of advantage to be gained, or of a loss or some disadvantage to be avoided, by the person who is said to be interested in the case.

8 Bom. L. R. 947.

(1) Pecuniary interest

A magistrate who is a shareholder of the company which is the complainant in the case, is disqualified from trying the case.

20 Bom. 502.

A magistrate should not entertain a criminal case in which persons indebted to him are concerned either as complainant or as accused.

Relationship

Magistrate who is a *servant* of the complainant will be disqualified.

7 *Cal. 322 : 10 Cal. 194.*

Magistrate who is *master* of the complainant will not be disqualified.

9 Bom. 172.

Magistrate who is *husband* of the complainant will be disqualified.

14 Bom. 572.

Distinction between 487 and 556

1. Section 487 does not disqualify an High Court Judge. Section 556 does.

2. Section 487 does not disqualify committal. Section 556 does.

Distinction between 556 and 526 (transfer)

Great deal confusion in cases.

Taking cognizance of an offence not of an offender.

* * * *

Section 129. Empowers a Magistrate to call in Military Power to disperse an unlawful assembly *which cannot otherwise be dispersed* when the dispersal of that assembly seems to be necessary for public safety.

(II) Powers to pass interlocutory orders in a criminal matter Section 36

1. *Ordinary Powers*

Mentioned in the *Third Schedule* to the Criminal Procedure Code. They vary with the class of the Magistrate.

2. *Additional Powers*

Local Government or the District Magistrate may invest any Sub-divisional Magistrate or any magistrate of the 1st, 2nd or 3rd class with certain additional powers. They are mentioned in the *Fourth Schedule* to the Cr. P. Code. They vary with the class of the Magistrate.

A Mode of Exercising such powers.

Section 107 (3) When a Magistrate has reason to believe that any person is likely to commit the breach of the peace or disturb the public tranquillity any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity, and that such breach of the peace or disturbance cannot be prevented such a magistrate may issue warrant for his arrest. He must record his reasons.

Courts can inflict such sentences as are authorized by law. If a criminal were to ask the Court to pass upon him a sentence not allowed by law instead of one which the law warrants such a sentence will not be valid.

3B.L.R. 50

Commutation. Section 59 of the Penal Code points out in what cases transportation may be awarded instead of imprisonment.

Transportation is only authorized in lieu of imprisonment as a *substantive* punishment. A sentence of nine years transportation and a fine of Rs. 300 and in default of payment, to three years further transportation, is bad in regard to the latter part of the sentence.

5 Mad. 28.

(III) Powers of punishment

The punishment for offences prescribed by Section 53 I. P. C. are :

I. Death

(a) Which *may be* inflicted Sections 121, 132, 194, 302, 305, 307,396.

(b) Which *must be* inflicted Section 303 (murder committed by a life convict).

II TRANSPORTATION

(i) for life.—

(a) Which *may be* inflicted Sections 75, 125,128.

(b) Which *must be* inflicted Sections 226, 311.

(ii) for any term.—

(a) Which *may be* inflicted Sections 121-A, 124-A.

(b) Which may *be* inflicted for not less than seven years and not more than the term for which the offender might be imprisoned. Section 59.

III. PENAL SERVITUDE

Which *must be* inflicted whenever a European or American is convicted of an offence punishable with transportation. Section 59.

IV. IMPRISONMENT

(1) Which may be for any term not exceeding 14 years.

(2) It may be simple or

(3) It may be rigorous.

Repealed by Section 4 of Act XVI of 1921

V. FORFEITURE (I) of *all* property

(a) Which *may be* inflicted. Section 62.

(b) Which *must be* inflicted. Sections 121, 122.

(II) of *Specific* property

(a) Which may be inflicted. Sections 126, 127.

(b) Which *must be* inflicted. Section 169.

REVISIONAL JURISDICTION

Civil Procedure Code	Criminal Procedure Code
Section 115	**Section 435**
The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—	(1) The High Court or any Sessions Judge or District Magistrate or any Sub-Divisional Magistrate empowered by the Provincial Government in this behalf, may call for and examine the record of any proceeding, before any inferior Criminal Court situated within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.
(a) to have exercised a jurisdiction not vested in it by law, or	*Explanation.*—All Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Session Judge
(b) to have failed to exercise a jurisdiction so vested, or	
(c) to have acted in the exercise of its jurisdiction illegally or material irregularity,	
the High Court may make such order in the case as it thinks fit.	

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Section 435—*contd.*

for the purposes of this sub-section and of section 437.

(2) If any Sub-Divisional Magistrate acting under sub-section (1) considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate.

* * * *

(4) If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them.

Section 436

On examining any record under section 435 or otherwise, the High Court or the Sessions Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make or direct any Subordinate Magistrate to make, further inquiry into

Section 436—*contd.*

any complaint which has been dismissed under section 203 or sub-section (3) of section 204, or into the case of any person accused of an offence who has been discharged :

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made.

Section 437

When, on examining the record of any case under section 435 or otherwise, the Sessions Judge or District Magistrate considers that such case is triable exclusively by the Court of Seession and that an accused person has been improperly discharged by the inferior Court, the Sessions Judge or District Magistrate, may cause him to be arrested,-and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial

CIVIL PROCEDURE CODE CRIMINAL PROCEDURE CODE

Section 437—*contd.*

upon the matter of which he has been, in the opinion of the Sessions Judge or District Magistrate, improperly discharged :

Provided as follows:—

(a) that the accused has had an opportunity of showing cause to such Judge or Magistrate why the commitment should not be made ;

(b) that, if such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Judge or Magistrate may direct the inferior Court to inquire into such offence.

Section 438

(1) The Sessions Judge or District Magistrate may, if he thinks fit, on examining under section 435 or otherwise the record of any proceeding, report for the orders of the High Court the result of such examination, and, when such report contains a recommendation that a sentence be reversed or altered, may order that the execution of such sentence be suspended, and, if

Section 438—*contd.*

the accused is in confinement, that he be released on bail or on his own bond.

(2) An Additional Sessions Judge shall have and may exercise all the powers of a Session Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge.

Section 439

(1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423,426,427 and 428 or on a Court by section 338, and may-enhance the sentence ; and when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

(2) No order under this section shall be made to the

CIVIL PROCEDURE CODE CRIMINAL PROCEDURE CODE

Section 439—*contd.*

prejudice of the accused un-less he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court the accused has committed than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the First Class.

(4) Nothing in this section applies to an entry made under section 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom

Civil Procedure Code	Criminal Procedure Code
	Section 439—*contd.*
	an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction.
	Section 440
	No party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision :
	Provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect section 439, sub-section (2).

REFERENCE

Civil Procedure Code

Section 113

Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the Court, and the High Court, may make such order thereon as it thinks fit.

Criminal Procedure Code

Section 432

A Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law which arises in the hearing of any case pending before him, or may give judgment in any such case subject to the decision of the High Court on such reference and, pending such decision, may either commit the accused to jail, or release him on bail to appear for judgment when called upon.

Section 433

(1) When a question has been so referred, the High Court shall pass such order thereon as it thinks fit, and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose of the case conformably to the said order.

(2) The High Court may direct by whom the costs of such reference shall be paid.

REVIEW

Civil Procedure Code	Criminal Procedure Code
Section 114	
Subject as aforesaid, any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred ; (b) by a decree or order from which no appeal is allowed by this Code, or (c) by a decision on a reference from a Court of Small Causes; may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.	No provision for Review.

APPEALS

Civil Procedure Code

Section 96

(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed *ex parte*.

Section 100

(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely :

(a) the decision being contrary to law or to some usage having the force of law ;

(b) the decision having failed to determine some

Criminal Procedure Code

Section 404

No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

Section 407

(1) Any person convicted on a trial held by any Magistrate of the second or third class, or any person sentenced under section 349 or in respect of whom an order has been made or a sentence has been passed under section 380 by a Sub-divisional Magistrate of the second class, may appeal to the District Magistrate.

(2) The District Magistrate may direct that any appeal under this section, or any class of such appeals, shall be heard by any Magistrate of the first subordinate to him and empowered by the Provincial Government to hear such appeals, and thereupon such appeal or class of appeals may be presented to such subordinate Magistrate, or if already presented to the

CIVIL PROCEDURE CODE

Section 100—*contd.*

material issue of law or usage having the force of law ;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

Section 104

(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders :

(a) an order superseding an arbitration where the award has not been completed within the period allowed by the Court;

(b) an order on an award stated in the form of a special case ;

(c) an order modifying or correcting an award ;

CRIMINAL PROCEDURE CODE

Section 407—*contd.*

District Magistrate, may be transferred to such subordinate Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred.

Section 408

Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the First Class, or any person sentenced under section 349 or in respect of whom an order has been made or a sentence has been passed under section 380 by a Magistrate of the First Class, may appeal to the Court of Session :

Provided as follows:

* * *

(b) When in any case an Assistant Sessions Judge or a Magistrate specially empowered under section 30 passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation, the appeal of all or any

CIVIL PROCEDURE CODE

Section 104—*contd.*

(d) an order filing or refusing to file an agreement to refer to arbitration ;

(e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration ;

(f) an order filing or refusing to file an award in an arbitration without the intervention of the Court;

(ff) an order under section 35A ;

(g) An order under Section 95 ;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree ;

(i) any order made under rules from which an appeal is expressly allowed by rules :

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

CRIMINAL PROCEDURE CODE

Section 408—*contd.*

of the accused convicted at such trial shall lie to the High Court;

(c) when any person is convicted by a Magistrate of an offence under section 124Aof the Indian Penal Code, the appeal shall lie to the High Court.

Section 409

An appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge :

Provided that an Additional Sessions Judge shall hear only such appeals as the Provincial Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him.

Section 410

Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court.

Section 411

Any person convicted on a trial held by a Presidency

CIVIL PROCEDURE CODE

Section 104—*contd.*

(2) No appeal shall lie from any order passed in appeal under this section.

Section 105

(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction ; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

Section 109

Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provi-

CRIMINAL PROCEDURE CODE

Section 411—*contd.*

Magistrate may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees.

Section 411A

(1) Without prejudice to the provisions of section 449 any person convicted on a trial held by a High Court in the exercise of its original criminal jurisdiction may, notwithstanding anything contained in section 418 or section 423, sub-section (2), or in the Letters Patent of any High Court, appeal to the High Court:

(a) against the conviction on any ground of appeal which involves a matter of law only ;

(b) with the leave of the Appellate Court, or upon the certificate of the Judge who tried the case that it is a fit case for appeal, against the conviction on any ground of appeal which involves a matter of fact only, or a matter of mixed law and fact, or any other ground which appears to

CIVIL PROCEDURE CODE

Section 109-*contd.*

sions hereinafter contained, an appeal shall lie to His Majesty in Council—

(a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction ;

(b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction ; and

(c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

Section 110

In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

or the decree or final order must involve, directly or indirectly, some claim or question

CRIMINAL PROCEDURE CODE

Section 411 A—*contd.*

the Appellate Court to be a sufficient ground of appeal; and

(c) with the leave of the appellate Court, against the sentence passed unless the sentence is one fixed by law.

(2) Notwithstanding anything contained in section 417, the Provincial Government may direct the Public Prosecutor to present an appeal to the High Court from any order of acquittal passed by the High Court in the exercise of its original criminal jurisdiction, and such appeal may, notwithstanding anything contained in section 418, or section 423, sub-section (2), or in the Letters Patent of any High Court, but, subject to the restrictions imposed by clause (b) and clause (c) of sub-section (1) of this section on an appeal against a conviction, lie on a matter of fact as well as a matter of law.

(3) Notwithstanding anything elsewhere contained in any Act or Regulation, an appeal under this section shall be heard by a Division Court of

CIVIL PROCEDURE CODE

Section 110—*contd.*

to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

Section 111.

Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council—-

(a) from the decree or order of one Judge of a High Court constituted by His Majesty by Letters Patent, or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court at the time being ;

or

CRIMINAL PROCEDURE CODE

Section 411 A—*contd.*

the High Court composed of not less than two judges, being judges other than the judge or judges by whom the original trial was held; and if the constitution of such a Division Court is impracticable, the High Court shall report the circumstances to the Provincial Government which shall take action with a view to the transfer of the appeal under section 527 to another High Court.

(4) Subject to such rules as may from time to time be made by His Majesty in Council in this behalf, and to such conditions as the High Court may establish or require, an appeal shall lie to His Majesty in Council from any order made on appeal under sub-section (1) by a Division Court of the High Court in respect of which order the High Court declares that the matter is a fit one for such appeal.

Section 412

Notwithstanding anything hereinbefore contained, where an accused person has pleaded guilty and has been convicted by a High Court, a Court of Session or any Presidency Magistrate or Magistrate of the

CIVIL PROCEDURE CODE

Section 111—*contd.*

(b) from any decree from which under section 102 no second appeal lies.

Section 111 A

Where a certificate has been given under section 205 (1) of the Government of India Act, 1935, the three last preceding sections shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council, and accordingly references to His Majesty shall be construed as references to the Federal Court:

Provided that—

(a) so much of the said sections as delimits the cases in which an appeal will lie shall be construed as delimiting the cases in which an appeal will lie without the leave of the Federal Court otherwise than on the ground that a substantial question of law as to the interpretation of the said Act, or any Order in Council made thereunder, has been wrongly decided ;

CRIMINAL PROCEDURE CODE

Section 412—*contd.*

first class on such plea, there shall be no appeal except as to the extent or legality of the sentence.

Section 413

Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a High Court passes a sentence of imprisonment not exceeding six months only or of fine not exceeding two hundred repees only or in which a Court of Session * * * passes a sentence of imprisonment not exceeding one month only or in which a court of Session or District Magistrate or other Magistrate of the first class passes a sentence of fine not exceeding fifty rupees only

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CIVIL PROCEDURE CODE

Section 111 A—*contd.*

(b) in determining under clause (c) of section 109 whether the case is a fit one for appeal, and, under section 110, whether the appeal involves a substantial question of law, any question of law as to the interpretation of the said Act, or any Order in Council made thereunder, shall be left out of account.

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7. THE TRANSFER OF PROPERTY ACT

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CONTRIBUTION

1. Suppose two properties are mortagaged and they belong to different persons. Suppose for the relization of the mortgage money only one property is sold and the proceeds are found to be sufficient to pay the amount. The result is that one mortgagor has lost his property while the other gets it back without having to pay any thing.

This is a gross injustice. To remedy this injustice Equity invented the doctrine of Contribution which is embodied in Section 82.

2. According to this Section, the different owners are liable to contribute rateably to the debt secured by the mortage.

3. For determining the rate at which each should contribute the value therfore shall be taken as the value at the date of the mortgage deducting the amount of mortgage, if any, to which it was subject on that date.

1. The claim for contribution can arise only when the whole of the mortgage debt has been satisfied—26 *All. 407 (426, 27) T.B.*

2. The right to contribution is subject to the rule of marshalling. That is where marshalling comes into conflict with contibution, the rule of marshalling shall prevail—This is the meaning of the last para of Section 82.

WHO CAN CLAIM THE RIGHTS OF THE MORTGAGOR

Section 91.

* * * * *

HOW CAN CLAIM THE RIGHTS OF THE MORTAGAGEE

Section 92.

Any person *other than the mortgagor* who pays the mortgagee becomes entitled to the rights of the mortgagee.

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Such persons are—

1. Subsequent mortgagee.

2. Surety.

3. Any person having an interest in the property.

4. A co-mortgagor.

5. Any other person with whose money the mortgage has been redeemed if the mortgagor has by a registered deed agreed to this.

This is called the rule of subrogation.

II. DOES THE LAW OF SALE PRESCRIBE ANY PARTICULAR MODE OF TRANSFER ?

1. The Law of Sale of Immovable Property does prescribe a mode of transfer. The mode of transfer is either *Registration* or *Delivery of Possession.*

2. Whether the appropriate mode of transfer in any particular case is Registration or Delivery of Possession depends upon two considerations—

(i) Whether the immoveable property is tangible or intangible.

(ii) Whether the Immoveable Property is worth more than Rs. 100 or is less than Rs. 100.

3. If the property is *Intangible* then the transfer can take place only by registration, no matter what the value of the property is.

4. If the property is *Tangible* property then

(i) If it is worth more than Rs. 100 then the transfer must be by registration.

(ii) If it is worth less than Rs. 100 then the transfer may be either by Registration or by delivery of possession.

5. It is clear that in all cases except one, Registration is the only method of effecting a sale. The case where option is given either to register or deliver possession is the case where the property is tangible and is less than Rs. 100 in value.

6. *Registration and Delivery as alternative complimentary modes.*—In this connection the following points may be noted :—

(i) Where Registration is prescribed as the *only* mode of transfer, delivery of Possession is neither necessary nor enough to complete the transaction of sale.

(ii) Where delivery of possession is prescribed, Registration is not necessary to complete the sale. However, Registration without delivery will be enough to complete the sale.

7. *No other mode of Transfer.*—The provisions as to modes of transfer are exhaustive and a sale cannot be effected in any other way. Title cannot pass by admissin or by recitals in a deed or petitions to officers or entry in the record of rights. Admission that land has been sold, will not operate as an estoppel so as to do, away with the sale for a registered conveyance or delivery. 43 Cal. 790.

8. It is necessary to observe the prescribed modes of transfer :—

(i) Ownership does not pass except by a transfer in the prescribed form.

(ii) An unregistered deed *is not enough*

(a) In cases where Registration is compulsory.

(b) Also in cases where the value is less than Rs. 100 and the transfer is not made by delivery.

9. *Meaning of tangible and intangible*

(i) Immoveable Property is either *tangible* or *intangible.*

(ii) The distinction between tangible and intangible is analogous to the distinction made in English Law between a corporeal hereditament and incorporeal hreditament.

(iii) A corporeal hereditament is an interest in land in possession i.e. a present right to enjoy the possession of land. An incorporeal hereditament is a right over land in the possession of another, which may be a future right to possession, or a right to use for a special purpose the land in the possession of another e. g. a right of way.

(iv) The contract between tangible and intangible is a contract between the estate of one who is possessed of the land, the tangible thing and that of a man who has the mere right, the intangible thing, without possession of anything tangible.

(v) A thing to be tangible must be capable of actual delivery.

Sulaiman C.J. 50 All. 986.

10. *Meaning of Delivery of Possession*

(i) Delivery takes place when the seller places the buyer, or such other person as he directs, in possession of the property.

(ii) Delivery is an act which has the effect of putting the buyer in the possesssion of property.

(iii) What amounts to Possession ? The question remains unanswered. Is it actual possession ? or Is it symbolical possession ?

(iv) One view is that since delivery is prescribed for tangible property only what the Legislature intends is actual possession.

(v) The other view is that it is used in a wider and ordinary sense because in the great majority of cases, land is in the occupation of a tenant or the buyer and physical delivery is therefore immpossible.

(vi) The latter view is the generally accepted view, so that there is physical delivery, when the owner of property places the buyer in such relation to the land and its actual occupants as he himself occupies.

11. *Ownership when transferred*

(i) Ownership passes upon delivery or registration.

(ii) With regard to registration, the following points should be noted:—

(a) Once registration is effected, the title relates back to the date of the execution.

(b) A Registered sale-deed will not be defeated by another deed executed later but registered earlier.

(c) The transfer will not be subject to *lis pendens* if the deed was executed before the suit but registered after the suit.

(d) Although it is true that property does not pass i. e. ownership is not transferred until Registration is effected, it is not true to say that property passes as soon as the instrument is registered, for the true test is the intention of the parties.

3. Section 55 (3)— *To deliver title-deeds :—*

1. Title-deeds are accessary to the estate. They pass with the conveyance without being named.

2. This includes *all* deeds relating to the property conveyed in possession as well as in power.

3. The liability to deliver title-deeds also includes the liability to bear the cost of obtaining them.

4. Counterparts leases and Kabulayets are deeds of title accessory to the estate.

5. The duty to deliver title-deeds is not dependent upon the completion of the conveyance. This duty does not arise until the price has been paid.

EXCEPTIONS :

(i) When the seller retains parts of the property comprised in the deeds, he may retain the deeds but is under an obligation for

their safe custody and to produce them or give true copies when required.

(ii) When property is sold in different lots—the purchaser of the lot of the *greatest lot is* entitled to the documents—subject to the same obligations as above.

By an express covenant, it may be given to the purchaser of the *largest lot* i.e. in area.

6. The sub-section does not say what is to happen if the sales are at different times.

BUYER'S LIABILITIES

I. Before Conveyance

1. Section 55 (5) (a)— *To disclose facts relating to the interest of the seller in the property materially increasing value.*

1. Every purchaser is bound to observe good faith in all that he says or does in relation to the contract and must abstain from all deceipt, whether by suppression of truth or by suggestion of falsehood.

2. The buyer, however, is under *no* duty to disclose latent advantages as the seller is to disclose latent defects.

3. To this rule, matters of title are an exception. Although the seller's title is ordinarily a matter exclusively within his knowledge, yet there may be cases where the buyer has information which the seller lacks. In such cases he must not make an unfair use of it.

Illustration 1.—Summers vs. Griffiths.

An old women sold property at an undervalue believing that she could not make out a good title to it while the buyer knew that she could. The sale was set aside.

Illustration 2.—Ellard vs. Llandaff (Lord)

The lessee obtained a renewal of a lease, in consideration of a surrender of the old lease, suppressing the fact (that)* the person on whose life the old lease depended was on his death-bed.

* Inserted—ed.

2. Section 55 (5) (6)—*To pay the Price.*

1. The buyer is not bound to pay the price except on a complete conveyance to himself of the whole interest that he has purchased.

2. If the property is sold free from incumbrances and these are not discharged at the time of conveyance, the buyer is not bound to pay.

3. His remedies for getting rid of incumbrances are—

(i) Under Section 18 (c) of the Specific Relief Act to compel the vendor tot discharge them,

(ii) He may discharge it himself and set off the amount against purchase money.

(iii) Recover it by subsequesnt suit against the vendor.

4. This sub-section imposes a personal liability on the buyer apart from the liability imposed by Section 55 (4) (b) on the property—*52 All. 901.*

BUYER'S LIABILITIES

II. After Conveyance

1. Section 55 (5) (c)—*To bear loss, etc.*

1. Under sub-section 55 (1) (c) the seller is to bear the loss between Contract and Conveyance.

2. After conveyance the buyer is the owner and the property is at his risk. He must therefore bear the loss.

3. This is different from English Law under which the contract for sale transfers an equitable estate and with it liability for loss or destruction.

4. The seller is liable for waste and if the seller has insured the property, the buyer can comple him to apply it for restoration.

2. Section 55 (5) (d)—*To pay outgoings.*

1. Before conveyance this liability falls upon the seller—55 (1) (g) after conveyance it falls on the buyer— Public charges, Rent, Interest and Incumbrances.

2. The liability is statutory and not merely contractual and therefore it is binding on a minor vendor on whose behalf the property is sold—*46 Mad. L. J. 464.*

3. If property is sold free from incumbrances, the seller must discharge it. If sold, subject to incumbrances, then the interest on incumbrances *upto sale* must also be paid by the buyer—*26 Bom. S. R. 942.*

RIGHTS OF BUYER AND SELLER

RIGHTS OF THE SELLER

I. Before Conveyance

1. Section 55 (4) (a)—*To take rents and profits.*

1. Until conveyance, the seller continues to be the owner. Therefore, he has a right to take rents and profits of the property.

II. After Conveyance

1. Section 55 (4) (b)—*To claim charge on property for price not paid.*

1. If the sale is completed by conveyance and the price or any part of it is unpaid, the seller has under this sub-section a charge for the price or for the balance.

2. The charge is a non-possessory charge i. e. it does not give a right to retain possession. As the ownership has passed, the charge gives the seller no right to refuse possession—*30 Mad. 524 ; 43 Mad. 712* ; *23 Bom. 525 ; 34 Mad. 543.*

3. The charge being on the property, it does not matter if there are several purchasers who had agreed among themselves to pay in a certain proportion.

4. The claim for a charge for unpaid price, not only subsists against the original buyer, but is also available against a transferee *without consideration* or a transferee with notice of non-payment.

5. The charge is not only for the purchase money but also for interest on the purchase money.

6. The right to a charge for interest commences only from the date on which possession has been delivered. The right to include interest for the purposes of a charge on the property *before*

possession has been delivered depends upon the equities and circumstances of the case.

Illustration.—If the purchaser retains part of the purchase money as security for the seller discharging an incumbrance, he is not liable to pay interest.

7. *English and Indian Law.*

(i) Under the English Law the seller has a lien from the date of the Contract.

(ii) Under the Indian Law the charge begins from the date of the conveyance.

(iii) The reasons for this difference :—

(a) Under the English Law, the seller parts with the estate as a result of the contract.

(b) Under the Indian Law, the seller parts with it as a result of conveyance.

(c) The result is the same, for both give the right to proceed against the property. The only difference is that the English lien being equitable, can be moulded by equity to suit circumstances. While the Indian charge being statutory, is rigid and must conform to the terms of the statute.

BUYER'S RIGHTS

I. Before Conveyance

1. Section 55 (6) (b)— *To claim a charge on the property for purchase money paid before conveyance.*

1. The clause as worded makes no sense. It is in two parts. If the clause "unless he has improperly declined to take delivery" which is negatively put was put positively to read "if he has properly declined" then there is no distinction between the two clauses.

2. But there is a distinction between the two parts which is a distinction arising from burden of proof. Under the first part, the purchaser is entitled to certain rights which he can enforce "unless he has improperly declined to take delivery" which means that he is to lose those rights if the seller proves that he, the

purchaser, has improperly declined to accept delivery. Under the second part of the clause, the purchaser gets certain additional rights which he can claim, only if, he can show that "he has properly declined to take delivery" and the burden of showing it will be upon him.

3. Under this clause, a buyer has a right to a charge for three things :—

(i) for the amount of purchase money properly paid,

(ii) for the earnest if any,

(iii) for the costs awarded to him.

4. *Charge for Purchase money paid.*

1. This charge attaches from the moment the buyer pays any part of the purchase money.

2. Charge for purchase money is lost *only* when the seller proves that the buyer has improperly declined to take delivery. The burden of proof is upon the seller.

5. *Charge for earnest and cost.*

(1) There is a possibility for a charge in respect of these two. But this possibility will be realized only if the buyer proves that he has properly declined to take delivery. The burden of proof is upon the buyer.

6. *Earnest and Part Payment of Purchase money.*

(1) What is stated above about charge in respect of earnest applies only if the money paid is paid as earnest.

(2) Money paid by a buyer before conveyance serves two purposes: (1) It goes in part payment of the purchase money for which it is deposited. (2) It is security for the performance of the contract. In the latter case it is earnest. In the former case it is instalment.

(3) This difference is important because whether there would be a charge or personal liability or there would not be, would depend upon whether the payment made is *Instalment or Earnest.*

(i) If it is earnest—There is no charge (except in the case of a buyer who proves that he has properly declined to take delivery). Earnest is

wholly lost and there is not only no charge but there is even no personal liability.

(ii) If it is part payment—There is a charge unless seller shows that the buyer has improperly refused to take delivery. Part payment is never wholly lost. If it fails to create a charge, it remains as a personal liability of the seller.

(4) Whether it is part payment or earnest is matter of contract or intention.

7. The purchaser's charge can be enforced against the seller and all persons claiming under him.

8. (1) The buyer loses his charge :—

(i) By his own subsequent default.

(ii) By his improperly refusing to take delivery.

(2) Earnest money—There are two purposes underlyning Earnest:—

(i) It goes in part payment of the purchase money.

(ii) It is a security for the performance of the contract. It becomes part of the purchase money if the contract goes through. It is forfeited, if the contract falls through by reason of the fault or failure of the purchaser.

II. After Conveyance

1. Section 55 (6) (a)—*To claim increment.*

1. This must be so, because, after conveyance he is the owner.

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Sales free Incumbrances

1. As far as possible, a sale ought to be free from incumbrances. To provide sales being made free from incumbrances T. P. Act contains two sections which make it possible. They are Section 56 and Section 57.

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SECTION I

THE NATURE OF A MORTGAGE

I. DEFINITION.

1. Section 58 defines what is a mortgage. According to the section, there are three ingredients of a mortgage transaction :—

(i) The transfer of interest.

(ii) In specific immoveable property.

(iii) For the purpose of securing the payment of money advanced by way of a loan.

II. EXPLANATION OF THESE INGREDIENTS.

(i) Immoveable property is not an essential ingredient of mortgage :

(1) Under the English Law, all kinds of property, personal or real, can be made the subject of a mortgage. The Real estate may be corporeal or incorporeal and the personal estate may be in possession or in action. The Estate may be absolute or determinable i.e. for life: it may be legal or equitable. Not only any kind of property may be the subject-matter of a mortgage but any interest in it may be mortgaged, whether such interest is vested, expectant or contingent.

(2) The Transfer of Property speaks only of immoveable property in relation to mortgages. This gives the impression that the law does not recognize the mortgage of a moveable property. This would be a mistake. The Transfer of Property Act merely *defines* and *amends* the law relating to property. It does not consolidate the law. It is, therefore, not a complete or exhaustive code of law relating to mortgage.

(3) Mortgages of moveables are recognized in India.

9 C. W. N. 14 : 8 Bom. S.R. 344.

(4) *Law by which mortgages of moveables are governed.*

The Transfer of Property Act makes no provision: The Indian Contract Act makes no provision. Consequently the principles of English Law will be applicable to such mortgages.

34 Cal. 223 (228) : 27 Bom. S.R. 1449.

(5) Mortgage of moveable property may be effected without writing.

(6) Mortgage of an actionable claim—in writing—though moveable by reason of Section 130 T.P.—*37 Bom. 198. (P. C.)* Deposit of insurance policy.

(ii) Transfer of an Interest:

1. It means the tranfer of *some* right belonging to the mortgagor in respect of the property.

2. Ownership consists of a bundle of rights, such as, right to possess, right to enjoy, sell, etc.

3. It is enough if one of these rights is transferred. The right transferred may vary :—

(i) It may be the right to sell.

(ii) It may be the right to enjoy.

(iii) It may be the right to own.

4. The nature of the right transferred is matter of no consequence so long as some right is transferred.

III. THE PURPOSE MUST BE SECURING THE PAYMENT OF MONEY ADVANCED.

1. The transfer of interest is by way of *Security*. The idea of a Security involves two things. There must be a debt or pecuniary liability and secondly there must be some property pledged for the meeting of that liability.

2. The purpose of the transfer must be securing of the debt. A transfer made for the purpose of securing a debt must be distinguished from a transfer, the purpose of which is to discharge a debt.

25 All. 115=30 I. A. 54.

11 Bom. 462.

3. The right trasferred must be to enable the man to recover the debt. The transfer must not extinguish the debt. If the effect of the transfer is to extinguish the debt then there is no mortgage.

Illustration.—

11 Bom. 462 Abdulbhai vs. *Kashi*

In 1862, *A* in consideration of Rs. 150 passed to *B* a writing called *Karz Rokha* (or debt-note). It proved (*inter alia*) that *B* should hold and enjoy a certain piece of land belonging to *A* for twenty years, that at the end the land should be restored to *A* free from all claims in respect of principal or interest.

Held, not a mortgage.

25 All. 115.

MORTGAGE COMPARED WITH OTHER FORMS OF ALIENATIONS

MORTGAGE AND SALE

1. Sale is defined in Section 54—It is a transfer of ownership for a price. The price is not a loan and the transfer is not a transfer of an interest but is an absolute transfer of ownership.

2. In a mortgage, the money paid is a loan and the transfer is a transfer of an interest only.

3. In a breach of a contract of sale, the rights are the rights of a vendor and purchaser while the contract is a contract of mortgage the rights are those of a mortgagor and mortgagee.

4. In sale, the property is transferred absolutely. In mortgage, the property serves only as a security for the repayment of a debt.

MORTGAGE AND OTHER KINDS OF SECURITIES

1. There are four kinds of securities (1) mortgage, (2) pledge, (3) lien and (4) hypothecation or charge.

It is important to note the distinction between mortgage and other kinds of securities.

I. Mortgage and Pledge

1. The bailment of good as security for payment of debt or performance of a promise is called a 'pledge' —*Section* 172 Indian Contract Act.

2. In a mortgage, general ownership in the property passes to the mortgagee and the mortgagor has only a right to redeem. In a pledge, only 'a qualified or special property' passes to the pledgee, the general ownership remains in the pledgor.

3. Delivery of possession of the property pledged to the pledgee is essential. But delivery of possession is not essential to a mortgage.

4. The property which is once pledged cannot be pledged a second time, because, no possession can be granted to the second pledgee, while property which is mortgaged once to one person can be mortgaged again to others subsequently.

5. Pledge can only be of *personal* property. Mortgage can be of both personal as well as real property.

Mortgage and Liens

1. A lien is a kind of security which is created by the operatin of the law. Lien is a right created by law and not by contract to retain possession of the property blonging to another until certain demands are satisfied.

2. The law on the subject of lien is scattered in many statutes of the Indian Legislature. E.g. Contract Act Sections 170-General-171-Bankers Solicitors, etc., 221-Agent's lien. Sale of goods 47, unpaid Vendor's lien. T. P. 554 : 55 (6) seller's and buyer's lien.

3. Lien does not create general ownership as a mortgage does, not even qualified property as in a pledge—only right to retain possesion.

4. Both mortgagee and pledgee can sell: but lien holder cannot.

Mortgage and a charge

1. A charge is defined in Section 100. There are two elements in a charge :

(1) There is a pecuniary liability.

(2) Immoveable property is made security for the discharge of that pecuniary liability.

2. In a mortgage there are three elements :—

(i) There is pecuniary liability.

(ii) Immoveable property is made security for the discharge of that pecuniary liability.

(iii) There is a transfer of an interest in that property in favour of the creditor.

3. In a charge there is no transfer of interest. There is only burden.

35 Cal. 837 (844) ; 13 Lah. 660 T. B.

35 Cal. 985.

4. The difference between mortgage and charge is material.

1. A mortgagee can follow the mortgaged property in the hands of any transferee from the mortgagor. While a charge can be enforced only against transferee with notice—

33 Cal. 985.

§ DIFFERENT CLASSES OF MORTGAGE

1. The section enumerates six classes of mortgage :—

(i) Simple mortgage.

(ii) Mortgage by conditional sale.

(iii) Usufructuary mortgage.

(iv) English mortgage.

(v) Equitable mortgage.

(vi) Anomalous mortgage.

2. Characteristics of the different classes of mortgage.

(i) Simple Mortgage

1. A Simple mortgage involves two things :

(i) A personal obligation, express or implied, to pay.

(ii) The transfer of a right to cause the property to be sold.

Personal obligation

1. When a person accepts a loan, there is involved a personal liability to pay, unless there is a covenant to pay out of a particular fund.

10 Cal. 740 ; 22 Cal. 434 ; 16 Cal. 540 ; 13 Mad. 192 ; 15 Mad. 304 ; 27 Mad. 526 : 86.

1. A loan may be a secured loan or unsecured loan.

2. Every unsecured loan involves a personal obligation to pay.

44 I. A. 87.

3. The only case of a loan in which a personal obligation to pay is negatived, is where there is a covenant to pay out of a particular fund.

Cases. 10 Cal. 740 ; 22 Cal. 434 ; 16 Cal. 540 ; 13 Mad. 192 *15 Mad. 304 ; 27 Mad. 526 : 86.*

4. Whether a loan, for which there is security, involves a personal obligation to pay is a question of construction. Two propositions may be stated as those of law :—

(i) Personal liability is not displaced by the mere fact that security is given for the repayment of the loan with interest.

(ii) The nature and terms of security may negative any personal liability on the part of the borrower.

5. In a simple mortgage, there is always security given for the loan. The loan is a secured loan. But nature and terms of the security must not negative the personal liability of the mortgagor. A personal covenant to pay is implied in and is an essential part of every simple mortgage.

Cases. 22 All. 453 (461); 29 Mad. 491 ; 30 All. 388.

6. In the absence of such a covenant, the security would be a mere charge.

Cases. 42 All. 158 (164)=46 I. A. 228 ; 52 All. 901.

II. Right to cause the property to be sold.

1. This is a right in rein although it can only be enforced by the intervention of the Court, as the words, 'cause to be sold' indicate.

2. The transfer of this right may be express or it may be implied.

(ii) Mortgage by Conditional Sale

1. Characteristics.

(1) The transfer is by way of sale. It is a transfer of ownership.

(2) The difference between sale and mortgage by conditional sale is that, in sale the transfer is absolute while in mortgage by conditional sale, it is not absolute but is subject to a condition.

(3) The condition may take three forms :—

(i) That on default of payment of mortgage money *on a certain day,* the sale shall become absolute.

(ii) Then on such payment being made, the sale shall become void.

(iii) That on such payment being made, the buyer shall transfer such property to the seller.

2. A mortgage by conditional sale and a sale with a condition of repurchase have a very close resemblance. In both cases, there is a right of reconveyance :—

(1) But they arc different in the nature of the terms on which the right to reconvey can be exercised vary.

(2) If it is a sale with a condition of repurchase then :—

(i) The right is personal and cannot be transferred.

(ii) The right can be enforced on strict compliance with the terms laid down by the condition of repurchase.

Cases. 10 Cal. 30 ; 6 All. 37 ; 21 Bom. 528.

(3) If it is a mortgage by conditional sale, then—

(i) The right to reconveyance is not personal but is a right in term and can be exercised by the transferee.

(ii) Time will not be treated as of the essence.

3. *What is it that distinguishes sale with a condition of repurchase and mortgage by conditional sale ?*

(1) In a mortgage by conditional sale, the transaction notwithstanding the form, remains a lending and borrowing transaction. The transfer of land, although it is in the form of a sale, in fact it is a transfer by way of security.

(2) In a sale with a condition of repurchase, the transaction is not a lending and borrowing arrangement. It is not a transfer of an interest. It is a transfer of all rights. It is not a trnasfer by way of security. It is an absolute transfer reserving only a personal right of repurchase.

What is the test for determining whether a transaction is a mortgage ?

(1) No particular words or form of conveyance are necessary to constitute a mortgage. As a general rule, subject to very few exceptions, where a transfer of an estate is *originally* intended as a security for money, it is a mortgage and where it is not so originally intended, it is not a mortgage.

(2) It is not the *name* given to a contract by the parties that determines the nature of the transaction. A document may be held to be a sale although it is called a mortgage by the parties.

2 Bom. 113.

(3) It is the jural relation constituted by it, that will determine whether the transaction is a mortgage or not.

2 Bom. 462.

4. *How to find what the intention of the parties was* ?

By finding out how they have treated the money advanced ? If they have treated it as a debt, then it is mortgage. The criteria adopted by the Courts are—

(i) The existence of a debt

(ii) The period of repayment, a short period being indicative of a sale and a long period of a mortgage.

(iii) The continuance of the mortgagor in possession indicates a mortgage.

(iv) The price below a true value indicates a mortgage.

In applying these tests, the Courts put the onus on the party alleging that an ostensible sale-deed was a mortgage, and in a case of ambiguity, lean to the construction of a mortgage.

5. *Is oral evidence of intention admissible* ?

1. Before the Indian Evidence Act was passed, oral evidence and other instruments were freely admitted to prove this intention. But this practice was condemned by the Privy Council.

2. After the passing of the Indian Evidence Act, the question was governed by Section 92.

3. Section 92 excludes oral evidence to contradict a written document. The Indian Courts, never the less, on the authority of *Lincoln* vs. *Wright (1859) 4 DeG.& J. 16* admitted evidence of acts and conduct of parties to show, that a deed which purported to be an absolute conveyance was intended to operate as a mortgage.

4. In 1899, the Privy Council definitely ruled in *Balkishen v/s. Legge= 22 All. 149 =27 I. A. 58.* that the rule in *Lincoln* vs. *Wright* had no application in India.

5. The result is that, the Courts are definitely limited to the document itself in order to ascertain the intention of the parties.

The question is not what the parties meant, but what is the meaning of the words they used.

Importance of the Proviso.

1. The condition must be embodied in the same document.

Points to be noted.

1. Only means that in determining the question if the condition is contained in another document Court cannot take into consideration in determining intention.

2. But, even if, it was contained in the same document, it is necessarily a mortgage by conditional sale and not a sale with the condition of repurchase.

3. The question of construction still remains.

(iii) Usufructuary Mortgage

1. CHARACTERISTICS.

(i) Delivery of possession or undertaking to deliver possession.

(ii) Authority to retain such possession until payment of mortgage-money.

(iii) Authority to receive the rents and profits and to appropriate the same in liue of interest or in payment of the mortgage-money.

NOTE.—There is no personal obligation to pay.

(iv) English Mortgage

I. CHARACTERISTICS

(i) There is a personal obligation to repay by the mortgagor on a certain day.

(ii) The transfer of the mortgagee is *absolute*.

(iii) The transfer is subject to the proviso that the mortgagee shall reconvey the property on payment.

II. This closely resembles the conditional mortgage.

Difference.

(i) In the English Mortgage the sale is absolute while in the mortgage by conditional sale the sale is *ostensible*.

Query. How can it be a mortgage if the sale is absolute ? This seems to conflict with the definition of mortgage which is transfer of an interest.

Difference in practice merely means this: that in English Mortgage, the mortgagee is entitled to immediate possession, While in the case of a mortgage by conditional sale, the right to possession depends upon the terms of the mortgage.

(2) In English Mortgage, there is a personal obligation to pay. In a conditional mortgage, there is no such right.

REQUISITES OF A MORTGAGE BY DEPOSIT OF TITLE DEEDS.

I. *Debt.*

1. A debt has been defined as a sum of money due now even though payable in the future, and recoverable by action—(*1922*) *2 K. B. 599 (617).*

> NOTE.—As to difference between a debt due by statute and debt due by contract—(1922) 2 K. B, 37. There is no necessity of a promise to pay in order to render the money recoverable when the debt is a statutory debt.

2. The debt may be an existing debt or a future debt. The deposit may be to cover a present as well as future advances—*50 I. A. 283 ; 17 All. 252 ; 17 All. 252* ; *25 Cal. 611.*

3. The debt may be a general balance that might be due on an account.

2 Mad. 239 P. C.

II. DEPOSIT OF TITLE DEEDS.

(i) Title deeds

1. It has been held in England that it is sufficient if the deeds deposited *bona fide* relate to the property or are *material evidence of title,* and that, it is not necessary that all the deeds should be deposited. *(1872) 8 Ch. App. 155.*

2. These cases have been followed in India.

59 Cal. 781.

3. But Page *c.f.* in *11 Rang 239* F. B. held that the documents must not only relate to the property but must also be such as to show a *prima facie* or apparent title in the depositor.

4. If the documents show no kind of title, no mortgage is created—Tax receipt—Plan—not documents of title.

5. If the deeds are lost, copies may be deposited.

(ii) If the deeds are already deposited by way of mortgage, they can, by oral agreement, be made a security for further advance. It is not necessary that they should be handed back and redeposited.

17 All. 252.

25 Cal. 611.

III. Intention.

1. The intention that the title-deeds shall be the security for the debt is the essence of the transaction.

2. Mere possession is not enough without evidence as to the manner in which the possession originated so that a contract may be inferred.

23 I.A. 106; 38 Bom. 372.

1 Rang. 545.

3. If it is in contemplation of the parties to have a legal mortgage prepared and if the title-deeds are deposited for that purpose *only,* the deposit does not create an equitable mortgage.

4. But although the deposit is for the purpose of the preparations of a legal mortgage, there may also be an intention to give an immediate security, in which case the deposit creates an equitable mortgage.

5. The question is whether mere possession *coupled with debt* does not raise an inference that it is a mortgage ? There is a difference of opinion but the better opinion seems to be as between creditor and debtor possession coupled with debt raises a presumption in favour of a mortgage.

IV. Territorial Restrictions.

1. This kind of equitable mortgages can be created only in certain towns.

2. The question is, to what does the restriction refer ? Does it to the place where the deeds are delivered ? or does not refer to the place where the property mortgaged is situated ? It is held that the restriction refers to the place where the deeds are delivered and not to the situation of the property mortgaged.

Cases. 14 All. 238.
23 I. A. 106.

It is not necessary for the property to be situated in the towns mentioned.

(vi) Anomalous Mortgages

1. Any mortgage, other than those specified, is called an anomalous mortgage. It is a mortgage which does not fall within any of the other five classes enumerated.

2. Anomalous mortgages take innumerable forms moulded either by custom or the caprice of the creditor—some are combinations of the simple forms—others are customary mortgages prevalent in particular districts, and to these special incidents are attached by local usage.

What is it that distinguishes different kinds of mortgage.

It is the nature of the right transferred which distinguishes the mortgage.

(1) In a simple mortgage, what is transferred is a power of sale which is one of the component rights that make up the aggregate of ownership.

(2) In a usufructuary mortgage, what is transferred is a right of possession and enjoyment of the usufruct.

(3) In a conditional mortgage and in an English mortgage, the right transferred is a right of ownership subject to a condition.

(4) In a simple mortgage and English mortgage, there is a personal obligation to pay.

(5) In an usufructuary mortgage and mortgage by conditional sale, there is no personal obligation to pay.

What is it that is common to all mortgages.

1. A mortgage is a transfer of an interest in specific immoveable property as security for the repayment of a debt.

2. The existence of a debt is therefore a common characteristic.

3. It is said that this cannot be so because in a conditional mortgage or in an usufructuary mortgage there is no personal covenant to pay.

4. The reply to this is, a debt does not cease to be a debt. The remedy of an action for debt does not exist. The remedies for the recovery of debt may differ without the transaction ceasing to be a transaction for debt.

An ordinary mortgage of land may be viewed in two different aspects :

(1) Regarded as a promise by the debtor to repay the loan, it is a contract creating a personal obligation.

(2) It is also a conveyance, because it passes to the creditor a real right in the property pledged to him.

Out of this double aspect, many questions arise.

Q. I.—By what law the validity of a mortgage of land situated abroad should be governed ?

It is now settled that it is governed by the law of *situs,* and no distinction is recognized between an actual transfer and a mere executory contract.

Q. II.—What is the *situs* of the secured debt—Is the debt to be regarded as situated in the country where the debtor resides, or where the land on which it is secured is situated ?

The Privy Council says "It is idle to say that a debt covered by a security is in the same position with one depending solely on the personal obligation of the debtor".

III

REQUISITES OF A VALID MORTGAGE

This requires the consideration of the following topics:

I. Formalities with which a mortgage must be executed.

II. The proper subject-matters of a mortgage.

III. The capacity to give and to accept a mortgage.

IV. Contents of a mortgage-deed.

I FORMALITIES WITH WHICH IT MUST BE EXECUTED

Section 59.—

1. Except in the case of mortgage by a deposit of title-deeds, every mortgage created securing the repayment of Rs. 100 or more as principal money must, under the T. P. Act, be effected by a regisered instrument, signed by the mortgagor and attested by at least two witnesses.

2. Where the principal money is less than Rs. 100, a mortgage may be created either by such an instrument or except in the case of simple mortgage by delivery of possession of the mortgaged property.

3. If the principal is above Rs. 100, the transaction of mortgage must be in writing i.e. it must be by a deed and the deed must be :—

(1) Signed by the mortgagor.

(2) Attested by at least two witnesses.

(3) Registered.

4. If it is less than Rs. 100 no writing is necessary. Parol agreement is enough in the case of ;—

(1) Simple mortgage.

(2) Conditional mortgage.

(3) English mortgage.

(4) Usufructuary mortgage.

Parol agreement plus transfer of possession.

5. We have only to consider mortgages where the principal is above Rs. 100.

(1) § SIGNATURE

General Clauses Act 1897. Section 3 (52).

1. The signature may be made by means of types or by a facsimile. *25 Cal. 911.* Such person having a name stamp used by servant.

2. It may be the mark of an illiterate person.
41 Bom. 384 mark of a dagger.

3. But a literate person cannot sign by making a mark.

Confession not signed the accused was literate. *32 Cal. 550.*

Signature includes a mark in the case of a person unable to write his name.

(2) § ATTESTATION

1. *Attestation.*—To attest means to bear witness to, affirm the truth or genuineness of, to testify, certify. *Attestation* means the verification of the execution of a deed or will by the signature in the presence of witnesses. Attesting witness is a witness who signs in verification.

2. That being so question is, must the attesting witness be present at the execution of the instrument or a mere acknowledgement of execution by the mortgagor to a witness who afterwards subscribes his name is enough to satisfy the requirements of law in respect of attestation ?

3. The Privy Council has laid down that the attesting witness ought to be present at the execution of the instrument and a mere acknowledgement will not suffice.

39 I.A. 218; 35 Mad. 607 which overrule the Allahabad and Bombay decisions to the contrary—*27 Bom. 91 and 26 All. 69.*

§ ATTESTATION OF PARDANASHINS.

4. The same rule was applied. The signature of the Pardanashin lady must be in the presence of the witness otherwise he cannot be said to be an attesting witness.

Case Law.

45 I.A. 94.

A mortgage-deed for over Rs. 100 purported to be signed by a Pardanashin lady on behalf of her son, a minor and to be attested by two witnesses. It appeared from the evidence that the lady was behind the parda when the deed was taken to her for signature. The witnesses did not see her sign it, but her son came from behind the parda and told them that it had been signed by his mother ; they thereupon added their signatures as witnesses:—

Held that the deed was not "attested" within the meaning of section 59 of the T. P. Act.

42 I.A. 163

A mortgage-deed purported to be executed by two pardanashin ladies. It appeared from the evidence of two of the attesting witnesses that they saw the hand of each executant when she signed the deed, and that although they could not see the faces of the executants, they heard them speak and recognized their voices:—

Held that the deed was duly attested in accordance with the T. P. Act.

5. The Law is now changed and attestation on acknowledgement of his signature by the executant is good—See Definition *Attested* in section 3, T. P. Act as amended in 1926.

(3) § REGISTERED

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* * *

(Earlier portion not found—ed.) to operate immediately, it is not necessary that there should be a formal delivery or even that the document should go out of the possession of the party who executes it.

illus.—Exton vs. *Scott.* (1833) 6 Simons 31.

A certain person having received moneys belonging to another without any communication with him executed in his favour

* Page Left Blank.

a mortgage for the amount. The mortgagor retained the deed in his custody for several years and then died an insolvent. After his death the document was discovered in a chest containing his title-deed. It was contended that there was no binding mortgage, because there had been no delivery of the deed. But the contention is overruled, on the ground that there was no evidence to show that the deed was not intended to operate from the moment of its execution.

6. There seems to be an idea that if the deed is delivered to the other party, it must have immediate operation and *cannot* in point of law be delayed in its operation. But it is now established that evidence is admissible to show the character in which the deed is delivered to a person though he is himself a party taking under it and not a stranger. (1897) 2 Ch. 608.

7. Where an instrument is to come into operation, not immediately, but only upon the performance of some condition, it is known as an escrow which simply means a scrawl, or writing, that is not to take effect till a condition precedent is performed.

8. Mere execution is not enough. There must be intention to give it immediate effect. Delivery means an intention to give immediate effect. That intention is independent of the process of delivery or non-delivery.

9. Where a document intended to be executed by one or some only and others refuse to complete it the question whether it is binding on those who have executed it, is one of the intention of the parties to be gathered from the facts of each.

§ MATERIAL ALTERATION IN A DEED—EFFECT OF

1. A material alteration in a deed made *without* the consent of the mortgagor and with the privity and knowledge of the person who relies upon it, would altogether destroy the efficacy of the deed.

2. If blanks are left to be filled up with merely formal matters the mortgagee may fill them up without imperilling his rights. *(1905) 2 Ch. 455.*

3. The question what constitutes a material alteration within the meaning of the rule has given rise to some difference of opinion.

10 C. W. N. 788 (of Mukerji J.)

Any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke, which changes the legal identity or character of the instrument either in its terms or the relation of the parties to it, is a material change, or technically, *an alteration,* and such a change will invalidate the instrument against all parties not consenting to the change.

An addition of a party to a contract constitutes a material alteration.

§ IMPORTANCE OF THE THREE FORMALITIES

1. The absence of any of three formalities is fatal to the validity of the transaction. The word is *only*.

2. Not only the formalities must exist but they must be valid, i. e., in accordance with law.

3. Not only must there be signature but the signature must be valid.

4. Not only must there be attestation but the attestation must be valid. If attestation is invalid, the deed cannot operate as a mortgage—e.g. attestation without the presence or acknowledgement by the executor.

5. Not only must there be registration but the registration must be valid. Thus

(i) If the property is so incorrectly described that it cannot be identified—*18 Cal. 556*

4.B.

(ii) When the deed is registered in a circle in which the property is not situate.

29 Cal 654.

(iii) Where the deed is not presented for registration by the proper person the mortgage is invalid.

58 I. A. 58

Two other questions have to be considered in connection with the subject-matter of Formalities.

1 IS EXECUTION OF THE DEED ENOUGH TO GIVE EFFECT TO THE MORTGAGE ?

1. It is hardly necessary to state that the mere execution of a deed is not enough if it is not intended to operate as a binding agreement.

2. This is expressed in English Law by the formula that a deed must be delivered.

3. This may not be clear unless one understands what meant by 'delivered'. There is nothing mysterious about the delivery of a deed which does not represent any technical process, but only indicates that the instrument is to come into immediate operation.

4. Shephard in his *Touchstone* speaks of *delivery* as one of the requisites of a good deed and adds that it is a question of fact for the jury.

CASE LAW

I. Suit against Secretary of State

(1906) 1 K. B. 613 ; 5 Luc. 157; 37 Mad. 55.

II. Position of the Crown

1920 A.C. 508 ;1932 A. C.28 ; 1929 A. C.285 ; 8 App. cases 767 ; 8 M.I.A. 500 ; 1903 App. cases 501.

III. Paramountcy

(1792) 2 Ves. 60 ; 13 M. P. C. C. 22 ; (1906) 1 K. B. 613.

British India = Section 3(17) General Clauses Act, 1897. Whole of British India = includes the Scheduled Districts. 52 Mad. 1.

Any newly acquired territory becomes an annexation part of British *India—Onsley* vs. *Plowden (1856—59) 1 Bom. 145.*

But it retains its laws until altered by the Crown or Legislature. *19 Bom. 680 (686) following 1 M. I. A. 175/271.*

Acts such as Stamp Act passed by the Indian Legislature have been extended to many places which though outside British India are under British Administration (e. g. Bangalore, Hyderabad assigned districts: Baroda cantonment: Mount Abu, etc.) by

notifications under Sections 4 and 5 of the Foreign Jurisdiction and Extradition Act, 1879, and the Indian (Foreign Jurisdiction) Order in Council, 1902.

§ CAPACITY TO GIVE OR TAKE A MORTGAGE

1. A mortgage is a *transfer of property* and also a contract. It must therefore satisfy the requirements as to capacity laid down for a valid transfer of property and for a valid contract.

§ REQUIREMENTS AS TO CAPACITY FOR A VALID TRANSFER OF PROPERTY

1. Transfer of property means an act by which a living person conveys property to one or more other living persons or to himself or to himself and one or more other living persons—Section 5.

2. A mortgage being an act of transfer of property, the parties to an act must be living persons.

3. When it is said that both persons must be living it is obvious that the intention is to make two distinctions :—

(i) Between a transfer *inter vivos* and a will.

(ii) Between a transfer and the creation of an interest (Sections 13,14, 16 and 20).

4. A will operates from the *death* of the testator. A mortgage therefore cannot be created by a will. It must be created *inter vivos*. A will does not operate as a transaction between two living persons.

5. A mortgage is a transfer of an interest. Sections 13, 14, 16—20 permit that an interest may be created in favour of a person not in existence at the date of transfer. But a mortgage is not the creation of an interest, but it is the *transfer* of an interest.

§ Living.

1. What is the meaning of the word *Living* ? Does it mean one who has not suffered natural death or does it mean that a person has not suffered civil death ? There may be no natural death although there may be civil death.

Illus.

Sannyasi—Buddhist.

Where a person enters into a religious order renouncing all worldly affairs, his action is tantamount to civil death.

Illus.

Sannyasi—*Mulla.p. 113.*

Buddhist Monk—*7. Rang. 677.I. B.*

2. A person who is civilly dead is not dead for the purpose of the T. P. Act.

3. *Living* as defined in explanation 3 to Section 299, I. P. C. would indicate that some part of its body must have been brought forth. But under the Hindu Law a son conceived is equal to son born—*Mulla p. 319.* A person may be living for the purpose of the Hindu Law and may not be for the purpose of T. P. Act.

*16 Mad. 76 ; 37 All 162 ; 58 Mad. 886.**

4. Another case of a person in a like position is that of a convict. A convict under the English Law, since he cannot enter into a contract or dispose of property, has no power to lend or borrow money on mortgage ; but the administrator of a convict may mortgage any part of the convict's property.

A convict is defined in Section 6 of the Forfeiture Act *33 and 34 Vict. Ch. 23, 1870* : to mean any person against whom judgment of death, or of penal servitude, shall have been pronounced or recorded by any Court of competent jurisdiction in England, Wales or Ireland upon any charge of treason or felony.

5. What about the position of a convict in India.

* (Page left blank in the Ms—ed.)

* Even under English Law a child *enventre* son mere is deemed to be a living person. Cases referred to in 58 Mad. 886.

(1903) 2 Ch. 411

(1909) 1 K. B. 178

(1907) 2 K. B, 422

(1926) 96 L.I.K.B. 250.

Contra. *10 Lah. 713.*

§ PERSON

1. The word "person" according to the General Clauses Act includes any company or association or body of individuals whether incorporated or not.

2. That the word person includes a "juristic person" such as a corporation was a long established view. But it is now made clear by a special proviso which was added to Section 5 of the T. P. Act in 1929.

3. A corporation, which has power to acquire and hold land has also impliedly power to mortgage it for purposes of carrying out the object for which it was created. The powers of statutory corporations are generally speaking regulated by the act of incorporation, but where borrowing is necessary for the purposes of the corporation, it is not forbidden by the T. P. Act because it is a "person".

4. By Hindu Law an *Idol* is recognized as a juristic person capable of holding property.

31 I. A. 203.

But the possession and management of the property of the *idol* are vested in the Sebait. But as the ownership belonged to the idol and as the idol is a juristic person and therefore a living person, it can be a party to the mortgage.

§ REQUIREMENTS AS TO CAPACITY FOR CONTRACT

1. This is dealt with in Section 7. Two things are necessary under Section 7.

(i) Person must be competent to contract,

(ii) Person must be entitled to transferable property or authorized to dispose of transferable property.

(i) § COMPETENT TO CONTRACT

1. Section 4 says that the Chapters and Sections of the T. P. Act which relate to contracts shall be taken as part of the Indian Contract Act.

2. Competency to contract must therefore mean competency in accordance with the Contract Act.

Section 11, Every person is competent to contract who is of the age of majority according to the law to which he is subject, and

who is of sound mind and is not disqualified from contracting by any law to which he is subject.

3. Disqualification of an Insolvent.

A word may be said as to the capacity of an Insolvent to deal with any property subsequently acquired by him. Now it is settled Law that an insolvent, who has not received his final discharge, cannot create a mortgage on immoveable property acquired by him. *17 Mad. 21* (But *See 8 Cal. 556).*

§ ENTITLED

1. The question is whether *entitled* means entitled as a full owner or as a limited owner.

2. That a full owner has the capacity to mortgage is obvious. The question is whether a limited owner has the capacity to mortgage ?

3. Person holding property on trust for sale without express power to mortgage.

It may be laid down generally that a trust for sale containing a direction for absolute conversion does not authorize a mortgage.

4. *Partner*—can mortgage partnership property to secure partnership debt.

5. An executor or administrator under the Indian Succession Act is competent to transfer.

6. Hindu widow, a Member of a joint family and the Karta of a joint family, the Trustees of Hindu Religious Endowments.

7. The last two having their *power* and *necessity*.

§ TRANSFERABLE PROPERTY

1. The person whether he is a full owner or limited owner, the subject-matter must be transferable property.

2. What is transferable property ?

(i) Section 6 says—Property of any kind may be transferred, except as otherwise provided by this Act or by any other law. Every kind of property is transferable unless its transfer is prohibited by Law.

(ii) The exceptions fall under two heads

(a) Merely personal rights cannot be transferred.

(b) An interest in property restricted in its enjoyment to the owner personally cannot be transferred.

3. This shows that there may be a mortgage of moveable property. The T. P. Act does not deal with it because the contract deals with it as a pledge. It does not prohibit.

§ THE CONTENTS OF A MORTGAGE-DEED

It is desirable that the mortgage-deed should specify certain particulars.

1. The debt or engagement, which is the subject-matter of the security, should be specified in the deed, otherwise the mortgagor may substitute one debt for another.

2. The time for the payment or performance must be specified in the deed. A stipulation that whole will be payable on payment of instalment

3. The deed should also contain a covenant to pay because there are various kinds of mortgages in which no debt is implied.

4. The property which is given in mortgage should be sufficiently described. It is true, extrinsic evidence is always admissible for the purpose of identifying any property, where the description is either indefinite or even actually misleading.

Q.—Whether a mortgage can be created on a person's property, if such property is not specifically described ? Whether a general mortgage is valid ?

Q.—Whether a general pledge of all the property that the debtor then has, without any further distinction, can create a mortgage under our Law.

1. Distinction must be made between an instrument which contains sufficiently apt words to create a security and the one in which the debtor merely agrees that, if the money is not repaid, the obligee would be at liberty to recover the debt from the whole of the debtor's property.

In the latter case, if they *stand alone,* merely give the obligee the ordinary right of a creditor to levy execution on the property of his debtor and do not create any pledge.

Supposing the case to fall under the first head, is such hypothecation good to create a mortgage.

In India, the validity of such securities has been questioned on the ground that a general hypothecation is too indefinite to be acted upon.

(1) It is said that such hypothecations sin against the canon that a contract form must be definite and reliance is placed upon Section 29 of the Contract Act and Section 93 of the Evidence Act.

(2) Vagueness is a misleading term. It may mean (1) either that the language is so indistinct that it cannot be understood or (2) that the property to which it relates is not specified in the contract.

(3) Indefiniteness is, however, frequency confounded with what has been called wideness.

The subject-matter of a contract may be *wide and yet definite.* On the other hand it may be narrow and yet indefinite.

If a man says "I mortgage all my landed property", it is wide but definite.

If a man, who has several houses, says 'I mortgage one of my houses', the description is not wide but is still indefinite.

(4) The word 'specific' in the T. P. Act is used to distinguish it from general and unless the property is specified in the deed, there can be no mortgage in Law.

(5) The property must be specified although the Law does not say that it must be specified in any particular way.

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SECTION II

THE RIGHTS AND LIABILITIES OF THE MORTGAGE

INTRODUCTION

1. The property which is the subject-matter of the mortgage is subject to the rights of the mortgagor and the mortgagee.

2. There are two questions to be considered—

(i) What are the rights of the mortgagor and mortgagee ?

(ii) What is the *nature* of those rights ?

§ What is the nature of the rights

1. The English Law divides :—the interests of the mortgagor is spoken of as an equitable estate, while the interests of the mortgagee is spoken of as a legal estate. The Indian Law does not recognize this distinction between legal and equitable estate.

(1872) I.A. Supp. 47 (71).

30 I.A. 238.

2. Even under the Trust Act this distinction is not recognized.

58 I. A. 279.

3. Both have legal rights—there is nothing equitable as opposed to legal.

II. Under the English Law mortgagee is owner while the mortgagor has a bare right of reconveyance.

1. Under the Indian Law it is just the reverse. The mortgagor is the owner and the mortgagee has only a right in re *abena.*

Rights of the Mortgagor

1. The Rights of the mortgagor fall into three divisions—

I. The Right to redeem.

II. The Right to manage the property.

III. The Right to obtain re-transfer.

§ Right to redeem

Section 60

1. The right to redeem entitles the mortgagor to require the mortgagee to do three things—

(i) To deliver to the mortgagor the mortgage-deed.

(ii) To deliver possession if the mortgagee is in possession.

(iii) To have executed and registered an acknowledgement in writing that the right (is redeemed)*

2. This right to redeem he can exercise on the following conditions:—

(i) On payment or tender of the mortgage money.

(ii) At any time *after* the principal money has become *due*.

(iii) If the right to redeem is not extinguished by act of parties or by decree of a Court

(iv) If the mortgagor is prepared to redeem the whole.

I. Right to Redeem

1. The section is not prefaced by any such words as in the absence of a contract to the contrary.

2. The right of redemption is therefore a statutory right which cannot be fettered by any condition which impedes or prevents redemption.

49 I.A. 60.

3. Any such condition is void as a clog on redemption.

II. Clog on redemption—Any provision inserted in the mortgage transaction to prevent redemption by a mortgagor is void :

(1) The principle underlying the rule against clog is that, mortgage is a conveyance as a security for the payment of a debt. Nothing ought to prevent a man from getting back his *security*.

(2) There is a difference between *sale* and *security*. If sale, there is no right to get back property. If security, there is a right to get back property.

(3) This right cannot be taken away by a contract. If it does, it will be treated as a clog and will not be enforced.

* inserted—ed.

III. Instances of clog on redemption

I. The following clauses are clogs on Redemption :—

(1) Redeem during the life of the mortgagor.

(2) Redeem with his own money—not from any other person.

(3) Redeem by payment on due debt or the mortgage will become sale.

(4) Redeem on condition that mortgagor shall grant permanent lease to the mortgagee.

II. The following clauses are not deemed to be clogs on Redemption:—

(1) Not to redeem unless prior mortgages are redeemed.

(2) Not to redeem an usufructuary mortgage until after the expiry of 15 years.

(3) Postponement of the right to take possession after redemption for a reasonable and necessary period.

III. No hard and fast rule as to what is a clog and what is not:—

(1) The mere fact that the terms of a mortgage are hard, does not make the clause a clog.

(2) The test is whether it hampers the mortgagor in the exercise of his right to redeem in such a way as to place the right to redeem beyond his reach.

(3) If the clause is a clog, then it will not be enforced, even though it may be contained in a consent decree. The right to redeem cannot be said to have been waived by consent.

IV. The doctrine of clog on redemption relates only to the dealings which take place between the parties to the mortgage at *the time* when the contract of mortgage has been entered into. It does not apply to a contract made subsequently with each other.

1. That means that parties are not free at the time when the contract of mortgage is made to take away the right of the mortgagor to redeem.

2. But they are at liberty subsequently to alter the terms of the contract of mortgage and any clause which fetters the right to redeem will not be treated as a clog.

V. *Due.*

1. Must be distinguished from payable. Money may be payable but not due.

2. Due = demandable.

3. If it is not paid on due date, the right to redemption is not lost. Mortgage remains a mortgage—only it can be exercised.

VI. Payment.

(i) Payment must be to *all* if there are more than one mortgagee.

(ii) Mode of payment—legal tender or any other medium acceptable to the creditor,

(iii) Place of payment—(Page left blank in Ms—ed.)

Redemption and Improvements

Section 63 A.

1. The mortgagor on redemption is entitled to improvements in the absence of a contract to the contrary.

2. The mortgagor shall be liable to pay the cost of improvements if the improvement was—

(i) necessary to preserve the property from destination.

(ii) necessary to prevent security from being insufficient.

(iii) made in compliance with lawful order of a public authority.

3. This also is subject to a contract to the contrary.

4. Section 63 A lays down the general rule that ordinarily a mortgagee is not at liberty to effect improvements and charge the mortgagor therewith. The object of the law is to prevent a mortgagee from laying out large sums of money and thereby increasing his debt to such an extent as to cripple the power of redemption. The mortgagee cannot be allowed to make redemption impossible by making improvements—This is called improving a mortgagor out of his estate.

5. The mere *consent* of the mortgagor to improvements is not enough to make him liable, unless it amounts to a promise to re-imburse.

Right of Redemption and the benefit of the renewal of a lease

Section 64

The renewal of a lease is a kind of an accession to the original interest of the mortgagor.

1. If the mortgagee obtains a renewal of the lease, the mortgagor is entitled to the benefit of the renewed lease on redemption.

2. This is subject to a contract to the contrary.

Right of the Mortgagor to manage

Section 66

1. As long as the mortgagor remains in possession, he is at liberty to exercise the ordinary rights of property and to receive the rents and profits without accounting for them.

2. Question is whether the mortgagor is liable for waste ?

3. This is a Section which deals with the doctrine of waste. Waste is either voluntary or permissive. *Voluntary waste* implies the doing of some act which tends to the destruction of the premises, as by pulling down houses, or removing fixtures; or to the changing of their nature as the conversion of pasture land into arable or pulling down buildings.

Permissive Waste implies an omission whereby damage result to the premises, where for instance houses are suffered to fall into decay.

To constitute voluntary waste by destruction of the premises, the destruction must be wilful or negligent; it is not waste if the premises are destroyed in the course of reasonable user and any user is reasonable if it is for the purposes for which it is intended to be used, and if the mode and extent of the user is apparently proper, having regard to the nature of the property and what the tenant knows of it.

4. According to Section 66 the mortgagor is not liable for permissive waste. He is liable for voluntary waste which renders the security insufficient.

5. A security is insufficient if the value is less than 1/3 of the money due and less than 1/2 if the security is buildings.

For Section 65 A.—Please see page No. 523

Liabilities of the mortgagor

Section 65.

1. The liabilities consists of certain statutory covenants.

2. They are warranties for the breach of which the mortgagor is liable.

I. GENERALLY—

(a) *Covenant for title.*

(i) There is a title in the mortgagor in the interest transferred.

(ii) That he had the right to transfer.

Substituted Security

Where the owner of an undivided share in a joint and undivided estate mortgages his undivided share, the person who takes the security i.e. the mortgagee takes it subject to the right of these co-sharers to enforce a partition and thereby convert what is an undivided share of the whole into a defined portion held in severally—*11. A. 106.* After partition the security will be the separate share allotted in place of the undivided share. Proceed against the share allotted and not against share originally mortgaged.

* * *

(a) Covenant to deferred title.

(b) Covenant to pay public dues—if the mortgagee is not in possession.

(c) Covenant to pay prior incumbrance (debt) on its being due.

II. WHEN THE MORTGAGED PROPERTY IS LEASEHOLD.

(i) Covenant that all conditions have been performed down to the commencement of the mortgage.

(ii) Covenant to pay rent reserved by the lease if the mortgagee is not in possession.

(iii) Covenant to perform all the conditions if the lease is renewed.

These covenants are not personal covenants. They run with the mortgaged property and can be availed of by a transferee from the mortgagee.

* * *

Rights of the Mortgagee

1. They fall into two divisions—

(1) Right to realize the mortgage money.

(2) Right to have the security maintained in tact during the continuance of the mortgage.

I. RIGHT TO REALIZE THE MORTGAGE MONEY.

1. Under this fall the following rights—

(1) Right to foreclose 67.

(2) Right to sell 67/69.

(3) Right to sue for mortgage money 68.

(4) Right to claim money on sale and acquisition 73.

2. A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is a suit for foreclosure.

NOTE.—

1. Mortgage money does not mean the whole of the mortgage money. If a mortgage is payable by instalments, it is open to the mortgagee to bring a suit for foreclosure for an instalment of the principal and interest. *13 M.L.I.2.*

2. In the absence of an express stipulation, a mortgagee is not bound to receive payment by instalments—*24 All. 461.*

3. A suit for interest is maintainable even before the principal money became due unless there is a covenant prohibiting him from doing so.

4. The three rights are not available to every mortgagee.

I. THE RIGHT TO SUE FOR MONEY.

Section 68.

This is available only where the mortgagor binds himself to repay the same.

Question.—When can it be said that a mortgagor *personally* binds himself to pay ?

There are two views on the matter.

(a) A personal covenant is presumed in all mortgages of whatever form. According to this view, the only difference that can arise is that the Court might in the absence of an express covenant, demand more clearly implied covenants than it might require in other case—*13 Lah. 259.*

(b) The other view is that a covenant can arise only where there is an express covenant the words are *binds* himself. This clause would be unnecessary if personal covenant was implied in all cases.

By definition

Section 58.

1. The mortgagor in a simple mortgage *binds* himself to repay the money.

2. In a mortgage by conditional sale, he says that "if he pays he will recover his property".

3. In a usufructuary mortgage he does not even make this qualified covenant. It is therefore clear that a mortgagor can sue for a money decree in the case of a simple mortgage but not in the case of other kinds of mortgages unless there is an express covenant to that effect.

Exceptions.

The mortgagor can sue for a money decree from the mortgagor. But he cannot sue for a money decree from a transferee from the mortgagor or from his legal representative.—

Other cases in which he can sue for a money decree.

Generally a mortgagee can sue for a money decree when there is a personal covenant by the mortgagor to pay.

2. There are cases where a mortgagee can sue although there is no personal covenant to pay—

Section 68.

(i) Where by accidental causes, not due to the act of either party such as fire, flood or *vis major* the property is destroyed, wholly or partly, or is rendered insufficient and the mortgagor on being given an opportunity fails to give further security.

(ii) Where the mortgagee is deprived of the whole or part of his security by the wrongful conduct of the mortgagor.

(iii) Where the mortgagee being entitled to possession, the mortgagor fails to deliver possession or fails to secure the mortgagee in his possession.

Right to sell

1. This right belongs only to—

(i) Simple mortgagee.

(ii) English mortgagee.

(iii) Equitable mortgagee.

2. They cannot sue to obtain possession. They can only sue for sale. If the Court erroneously gives him possession, that possession does not amount to foreclosure and the mortgagor can subsequently redeem the mortgage.

19 Mad. 249 (252-53) P. C.

CONDITIONS FOR THE EXERCISE OF THE RIGHT OF SALE AND FORECLOSURE.

1. After the mortgage-money has become due and before decree for redemption is made.

2. Suit must be for the whole of the mortgage-money. There cannot be a suit for the realization of a part of the mortgage-money by sale or foreclosure of a part of the mortgage property.

Exception.—If there is a severence of the interests of the mortgagee with the consent of the mortgagor, a suit for a part may be brought by the mortgagee.

Section 67 A.

3. A mortgagee who holds *many* mortgages against the same mortgagor must bring *one* suit on those mortgages in respect of which—

(i) A right to sue has accrued to him and

(ii) In respect of which he has a right to obtain the same kind of decree.

Section 65 A.

4. If the mortgagor could not only manage the property but, if he is *lawfully* in possession of the mortgaged property, he shall have the power to make leases thereof which would be binding upon the mortgagee.

5. After the mortgage this power of the mortgagor to deal with the property is limitted. He has not anything like general authority.

6. The power to lease is circumscribed by certain condition.

(i) He may lease it in accordance with local law, custom or usage.

(ii) Every lease shall reserve lest rent can reasonably be obtained—rent shall not be paid in advance.

(iii) The lease must not contain a convenant for renewal.

(iv) Lease shall take effect from a date not later than 6 months from the date on which it was made.

(v) In the case of a lease of a building, the duration of the lease shall not exceed three years.

7. The general power of the lease is subject to a contract to the contrary. The other provisions are subject to variarions.

Right to foreclose. This right belongs to—

(1) Mortgagee by conditional sale.

(2) Mortgagee by anomalous mortgage by the terms of which he is entitled to foreclose.

Mortgagees who can neither sue for sale nor for foreclosure.

(1) Usufructuary mortgagee.

(2) Mortgagee of a Railway and canal or other work in the maintenance of which the public are interested.

Case of a mortgagor who may become a trustee or executor of the mortgagee or the mortgagee may become a trustee or executor of the mortgagor.

Can such a mortgagor or mortgagee foreclose sale ?

Sub-clause (b) of Section 67 provides for the case of a mortgagor who has become a trustee for the mortgagee. According to this clause a mortgagor trustee, who may sue for sale, is not allowed to foreclose.

In the other case the foreclosure is equally prohibited according to English practice on the principle that it is the duty of the trustee to consult the interests of the mortgagor and that it is for the mortgagor's interests that a sale and not foreclosure, should take place.

EXERCISE OF THE POWER OF SALE WITHOUT THE INTERVENTION OF THE COURT

1. As a rule, a mortgagee can bring the property to sale only through the Court.

2. Section 69 provides exceptions to this rule.

(i) Where the mortgage is an English mortgage and neither the mortgagor or the mortgagee is a Hindu, Mohamedan or Buddist or a member of a community notified in Gazette,

(ii) Where a power of sale is expressly given by the deed and the mortgagee is the S. of S.

(iii) Where a power of sale is expressly given by the deed and the property or any part of it was on the day of the execution of the deed situated in the towns of Bombay, etc.

Section 69 A.

3. The mortgagee who has the *power* (as distinguished from the right) to sell without the intervention of the Court is also entitled to appoint a receiver by writing signed by him or on his behalf.

4. The exercise of this power of sale or power of appointing a receiver is to notice to the mortgagor.

5. The notice must be in writing requiring payment of the principal money and default for three months.

Section 73.

I Mortgagee's Right to proceeds of sale

1. When property is sold for failure to pay arrears of revenue or other public charges and such failure is not due to default by the mortgagee, the mortgagee is entitled to claim the balance of the sale proceeds.

2. Similarly if he mortgage property is compulsorily acquired, the mortgagee shall be entitled to claim payment of the mortgage money out of the amount due to the mortgagor as compensation.

3. His claim shall prevail against all except those of the prior encumbrances.

4. The claim may be enforced although mortgage money has not become due.

II. Rights of the mortgagee to the maintenance of the Security in tact during the continuance of the mortgage.

I. Right to accession—Section 70.

II. Right to renewed lease—Section 71.

III. Right to preserve property—Section 72.

Section 70

1. § Right to accession.

1. The mortgagee is entitled to the accession for the purpose of his security *if* the accession is made after the date of the mortgage. *29 Cal. 803.* Where two mortgages were executed on a land on which there was a house and thereafter two new houses were built by the mortgagor on the land held that they were accessions on which a mortgagor could rely for security.

If the house was built *before* mortgage, he could not.

He could not if it was built after decree although the section does not say so.

This is subject to a contract to the contrary.

Section 71.

2. § Right to the benefit of a renewed lease.

He will be entitled to the benefit of the new lease for the purposes of his security.

This is subject to a contract to the contrary.

Section 72.

3. § Right to preserve the property.

1. A mortgagee may spend such money as is necessary—

(i) for the preservation of the mortagage property from destruction, forfeiture or sale.

(ii) for supporting the mortgagor's title to the property.

(iii) for making his own title thereto good against the mortgagor.

(iv) when the mortgaged property is a renewable leasehold, for the renewal of the lease.

(v) he may insure if the property is insurable and add the cost to the principal money.

Right of mortgage to Priority

I. Priority by time.

1. The general rule regarding priority in the matter of transfers of interests in immovable property is laid down in Section 48 of the T. P. Act.

2. The same rule applies to questions in regard to mortgages, so that priority of mortgages in India depends upon the respective dates of their creation, the earlier in date having precedence over the latter—*56 Cal. 868.*

3. Section 78 is an exception to this rule. It lays down that the Court would postpone the prior mortgagee to the subsequent mortgagee where the prior mortgagee has, through fraud, misrepresentation or gross neglect, induced the subsequent mortgagee to advance money on the security of the mortgaged property.

Misrepresentation:

1. Is defined in Section 18 of the Indian Contract Act.

2. It does not necessarily mean fraudulent misrepresentation.

Fraud

Gross Negligence.

There is a difference between English and Indian Law. According to English Law gross negligence means negligence *amounting to fraud.*

According to Indian Law gross negligence is different from fraud.

II. Priority by Payment.

Q.—Can a mortgagee acquire priority over an intermediate mortgagee by buying the rights of an earlier mortgagee ?

Section 93

1. A mortgagee cannot acquire priority over an intermediate mortgagee by paying off a prior mortgagee whether he pays with or without knowledge of the intermediate mortgagee.

2. A mortgagee making a subsequent advance to the mortgagor, shall not acquire priority in respect of such subsequent advance over an intermediate mortgagee, whether he makes the advance with or without the knowledge of the intermediate mortgagee.

Section 79

This Section forms an exception to the second rule laid down in Section 93.

Under Section 79. A subsequent mortgagee having notice of the prior mortgage is postponed in respect of any subsequent advance if the prior mortgage is made to secure future advances and the subsequent advance does not exceed the maximum.

Right of Mortgagee to Marshalling

Section 81.

Section 82.

Question of Marshalling

1. This arises when two or more properties are mortgaged to two *different* mortgagees in such a way that both properties are subject to the mortgage rights of one mortgagee while only one is subject to the mortgage rights of the other.

Illus.

A is the owner of two estates—Whiteacre and Blackacre. *A* mortgages Whiteacre and Blackacre to *B* and thereafter mortgages Blackacre to *C*.

The position that arises is this. *B* has a mortgage over Whiteacre as well as Blackacre. *C* has a mortgage over Blackacre only. From the standpoint of realizing the mortgage money *B* has a right to sell both Whiteacre as well as Blackacre. While C has a right to sell only Blackacre.

If *B* were allowed to exercise his rights as a mortgagee it would result in prejudice to the rights of *C*.

In order to protect *C* equity invented the doctrine of marshalling—under this equity compelled *B* to proceed first against that property which is not the subject-matter of security for the debt of another mortgagee. This is embodied in Section 81.

Note.—1. It is unnecessary for the mortgagee to have had no notice of the former mortgage in order that he may be able to claim the benefit of marshalling.

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8. LAW OF EVIDENCE

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LAW OF EVIDENCE

1. § Meaning of the word Evidence

Like most of the words used in the statutes the word has a popular as well as technical meaning.

Popular meaning

Evidence in its ordinary sense signifies that which makes apparent the truth of the matter in question.

4 Mad. 393.

Technical meaning

The word however is used in the Evidence Act in a technical sense.

Section 3 defines the sense in which the word evidence is used in the Evidence Act. According to that Section

Evidence means and includes :

(1) All Statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry;

(2) All documents produced for the inspection of the Court.

This definition of the term 'Evidence' is incomplete.

The depositions of witnesses and documents which only are included in the term evidence as defined by the section are the two principal means by which the materials upon which the judge has to adjudicate are brought before him. The examination of witnesses is generally indispensible and by means of it, all facts except the contents of documents may be proved (Sec. 59). For the proof a document as a statement made by the person by whom it purports or is alleged to have been made, oral Evidence is required. (Sec. 67-73).

As compared with the definition of the word "Proved" this definition of the word "Evidence" is narrow. According to the definition of the word "Proved",

"A fact is said to be proved when, after considering **the matters before it,** the Court believes it to exist . . . . . ."

The Expression **matters before it** is much wider than what the word Evidence is said to include.

Evidence does not include :

(1) Statement made by the parties and accused persons.

(2) demeanour of witnesses.

(3) Results of local inspection.

(4) Facts judicially noted.

(5) Any real and personal property, the inspection of which may be material in determining the question at issue such as weapons, tools or stolen property.

(6) Questions put to the accused by the Magistrate and the answers.

But all these are included in the expression "matters before it".

The point is that the definition of evidence is strictly applicable to matters dealt with in the Evidence Act. It does not apply to evidence as dealt with by other Acts.

2. § Genesis of the Indian Evidence Act.

1. The Law of Evidence in India is contained in Act I of 1872.

§ Diversity of the Law of Evidence

2. There were two sets of Courts in British India ever since 1773 when the Regulating Act was passed by Parliament with a view to control the administration by the East India Company of its Indian possessions. There were the Supreme Courts established by Royal Charter in the Presidency Towns of Bombay, Madras and Calcutta. In the Muffassils, there were Courts established by the East India Company, Civil and Criminal. The rules of Evidence followed by the Supreme Courts were different from the rules of evidence followed by the muffassil Courts.

3. The Supreme Courts followed such of the rules of evidence as were contained in the Common and Statute Law which prevailed in England before 1726 and which were introduced by the Charter of that year in India. Some others were rules to be found in subsequent statutes of Parliament expressly extended to India ; while others again, had no greater authority than that of use and custom.

4. For the Courts outside the Presidency Towns and not established by the Royal Charter no complete rules of Evidence were ever laid down or introduced by authority. Regulations made between 1793 and 1834 contained a few rules. Other were derived from a vague **customary law of evidence** partly drawn from the Hedya and **Mohomeden Law Officers.** Others were drawn from English text books.

§ Efforts towards Uniformity:

5. The first Act of the Governor General in Council which dealt with evidence, strictly called, was **Act X of 1835** which applied to all the Courts in British India and dealt with the proof of the Acts of the Governer General in Council.

This was followed by **eleven enactments passed at intervals** during the next twenty years, which effected various small amendments of the law of evidence and applied to the Courts in India several of the reforms in the law of Evidence made in England.

In 1855, Act II of 1855 was passed for the further improvement of the law of evidence which contained many provisions applicable to all the Courts in British India.

6. Notwithstanding this attempt at uniformity there continued to be a great deal of disparity between the rules of Evidence applicable in the Presidency Towns and those applicable in the Muffassil. This disparity continued to be the subject of frequent judicial comment.

To remedy this state of affairs, Act I of 1872 was passed.

§ Construction of the Act:

1. An Act may be (l) to *consolidate* or (2) to *amend* or (3) to *consolidate and to amend* or it may be to *define* i.e. to codify. The construction of an Act would differ according as it is a consolidating Act or a Codifying Act.

2. **Construction of a Codifying Act**: The rule of construction in regard to a Codifying Act is laid down in (1891) A. C. 107 (120).

Bank of England vs. *Vagliano.*

Lord Halsbury observed:

P.120.

> "I am wholly unable to adopt the view that where a statute is expressly said to Codify the law, you are at liberty to go outside the Code, so created, because before the existence of that code another law prevailed."

Lord Harschell observed:

P. 144

> "The proper cause is in the first instance to examine the language of the Statute and to ask what is its natural meaning, **uninfluenced by the considerations derived from the previous state of the law** and not to start with enquiring how the law previously stood and then assuming that it was probably intended to leave it unaltered, to see if the words will bear an interpretation in conformity with this view."

3. The object of codification of a particular branch of the law is that, on any point specifically dealt with by it, such law should be sought for in the codified enactment, and is ascertained by interpreting the language used.

4. **Construction of a Consolidating Act:** The rule of Construction in regard to a Consolidating Act is laid down in (1894) 2 Ch. 557.

Shitty J. (P. 561) observed after referring to the rule of construction laid down in *Bank of England* vs. *Vagliano* in regard to a codifying Act. in Lord Halsbury

> ". . . . . .But I have here to deal, not with an Act of Parliament codifying the law, but with an Act to amend and to consolidate the law and therefore it is I say these observations (of lord Halsbury) do not apply and I think it is legitimate in the interpretation of the section in this amending and consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the legislature."

5. The object of consolidation with or without amendment is merely to assemble together the scattered parts of the Existing law. It is merely a re-enactment of the old law. It is not a new enactment of the law. Prima facie the same effect ought to be given to its provisions as was given to those of the Acts for which it was substituted.

6. The Indian Evidence Act is as stated in the Preamble an Act to *Consolidate, define* and *amend* the law of evidence.

It is not a statute which merely consolidates and amends the evidence i.e. it codifies the law of evidence. Its constructions will be governed by the rule laid down in *Bank of England* vs. *Vagliano* and not by the rule laid down in it.

§ Scope and Extent of the Act

1. The scope of the Act is defined in *Section* 2. Under section 2 the law of evidence is contained:

(i) In the Evidence Act and

(ii) In other Acts or statutes which make specific provision on matters of evidence and which are not expressly repealed.

This Section in effect prohibits the employment of any kind of evidence not contained in the Act or any other statute or Regulation not expressly repealed.

Section 2:—The following laws shall be repealed.

(1) All rules of Evidence not contained in any Statute Act or Regulation in force.

(2) All such rules contained in Regulation as have acquired the force of law under Section 25 of the Indian Councils Act, 1861.

(3) Enactments mentioned in the Schedule.

2. The Evidence Act and other Acts relating to Evidence—

(1) The Evidence Act is a separate statute dealing with an important branch of law and its provisions are independent of the rules of procedure contained in the Criminal Procedure Code and must have full scope unless it is clearly proved that they have been repealed or altered by another statute.

7 Lah. 84.

§ Application of the Act
Section 1 prescribes the application of the Act

(1) Territorial Application

It extends to the whole of British India and therefore applies to the Scheduled Districts.

It extends to places where it has been declared to be in force.

(2) Application to Tribunals

It applies to all judicial proceedings **in or before any Court.**

(i) WHAT IS MEANT BY A JUDICIAL PROCEEDINGS?

There is no definition.

An inquiry is judicial if the object of it is to determine a jural relation between one person and another or a group of persons or between him and the Community generally ; but even a Judge acting without such an object in view is not acting judicially.

12 Bom. 10 M. I. A. 340.

An inquiry under section 32 of the Bombay Land Revenue Code is not a Judicial proceeding.

22 Bom. 936.

2. The Act applies to all judicial proceedings i.e. to **civil** as well as **criminal.**

3. The Act speaks of proceedings not merely suits and trials. Proceedings is a wider term. Inquiry under *Section 107* or *144* of the Criminal Procedure Code is not a trial but is a proceeding. Similarly execution of a decree is not a suit but is a proceeding. Consequently the Act applies to proceeds other than trials and suits.

(ii) **What is a Court**

1. Section 3 which is an interpretation clause speaks of the sense in which the word Court is used in the Act. According to this Section—

"Court includes all Judges and Magistrates, and all persons, except Arbitrators, legally authorised to take evidence."

2. **This Section does not define what is a Court.** It merely says what is to be included in the meaning of the word Court i.e. what functionaries are to be treated as a Court.

3. Where in an interpretation clause it is stated a term includes this and that, the meaning is that the term retains its ordinary

meaning and the clause enlarges the meaning of the term and makes it include matters which the oridnary meaning would not include.

23 A. L. J. 845.

4. The Court means all persons except Arbitrators who are legally authorised to take evidence. That being so the word Court is not to be confined to persons presiding over a Civil tribunal or a Criminal tribunal.

A Registrar holding an enquiry and taking evidence under the Registration Act is a Court.

15 Mad. 138.

A Commissioner appointed under order XXVI R. 1-10 of the Civil Procedure Code and under Section 503-508 of the Criminal Procedure Code is a person legally entitled to take evidence and as such he is a court.

5. Judges.

No definition of the word "Judges" is given in this Act. Section 2 (8) of the Civil Procedure Code defines the word 'Judge' to mean the presiding officer of a Civil Court.

Section 19 of the Indian Penal Code, also gives definition of the word Judge. According to this definition a Judge is a person designated as a Judge also a person who is empowered by law to give, in any legal proceeding, civil or criminal a definitive judgment.

6. Magistrates.

No definition of this term is given in the Act. The General Clauses Act (X of 1897) lays down the following definition of the term:—

Magistrate shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force.

7. The peculiarities of these definitions is that they are neither uniform nor are they co-extensive.

(i) The basis of the definition of Judge in the Civil Procedure Code is the presidency of the officer.

The basis of the definition of the same word under the Indian Penal Code is his authority to give the Judgement. The basis of the definition under the evidence is the power to take evidence.

(ii) The definition of a Judge under the Criminal Procedure Code would not include a Magistrate. But the definition in the Indian Penal Code would include a Magistrate.

(iii) The Evidence Act would not include Arbitrator either Judges or Magistrates. But the definition of 'Judge' in the Indian Penal Code would include Judges, Magistrates as well as Arbitrators.

The conclusion is that the definition of the word Court in the Evidence Act is framed only for the purpose of the Act itself and should not be extended beyond its legitimate scope.

§ Proceedings to which the Evidence Act does not apply

1. The Act does not apply to :—

(i) Judicial proceedings in or before a Court Martial convened under the Army Act or Air Force Act.

(ii) Affidavits presented to any Court or officer.

(iii) Proceedings before an Arbitrator.

Proceedings before a Courts Martial

1. The Act does apply to the proceedings of a Courts Martial under the Indian Army Act i.e., it applies to **Native Courts Martial.** *Act VIII of 1911.*

2. The Act also applies to all proceedings before the Indian Marine Courts.

Act XIV of 1887 s. 68.

Act V of 1898.

Act XVII of 1898.

Act I of 1899.

3. The Act does not apply to the proceedings of a Court Martial convened under the British Army or Air Force Act.

Questions relating to evidence are determined by **Ax loci contractus,** but by the law of the Country where the question arises,

where the remedy is sought to be enforced and where the court sits to enforce it.

The law of evidence which governs the proceedings before a court is the **Ax fori**.

This provision of the Evidence Act is an exception to this general principle.

II. Affidavits.

1. Ordinarily the evidenced witnesses shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge (Order 18 R. 1. Cl. P. C).

2. An Affidavit is a evidence contained in a statement or a declaration in writing on oath or affirmation before a person having authority to administer oath or affirmation.

3. Matters relating to affidavit are regulated by the Civil Procedure Code.

4. Affidavit is evidence not taken before the Court and not subjected to cross examination.

5. The safeguards for truth in affidavits are two :

(i) Provisions for the production of the witness for cross Examination.

(ii) Provisions of the Penal Law relating to giving of false evidence.

III. Proceedings of the Arbitrator.

He gives rough and ready justice and cannot be bound by the technicalities of the Law of Evidence.

§ Proper approach to the study of the Evidence Act.

1. The Indian Evidence Act divides the subject matter of evidence into three parts :

Part I deals with Relevancy of facts—what facts can be proved.

Part II deals with Proof.

Part III deals with Production and Effect of Evidence—Burden of Proof.

2. This may be a logical order. It may be a scientific order. But this certainly does not appear to be a natural order, natural from the point of view of the litigant.

3. The rules of Procedure regulate the general conduct of litigation ; the rules of pleading help to ascertain for the guidance of parties and the Court, the material facts in issue in each particular case. Then arises the question of proof i.e. the Establishment of the facts in issue by proper legal means to the satisfaction of the Court.

4. The first question which faces the litigant is **who must prove the issue ?** The questions bow and by what sort of evidence he can prove them are secondary questions to him. We must therefore begin with **Burden of Proof.**

PART I

BURDEN OF PROOF

(1) What is meant by Burden of Proof.

Description, letter, then definition :

The judge or jury can decide a case only by considering the truth and value of the several facts alleged and proved by the parties and as the facts are unknown to both judge and jury. They must be established by evidence. The question at once arises, which party must adduce evidence ? The responsibility for adducing such evidence as will establish any allegation is called the "Burden of Proof".

2. The subject-matter of the Burden of Proof as applied to judicial proceedings falls into two parts :

1. Burden of Proving an issue.

2. Burden of Proving a particular fact.

THE NECESSITY FOR MAKING THIS DIVISION.

1. The Proof of an issue may involve the proof of many facts as they may involve the proof of only one fact.

Illustration :

1. Issue is, Did *A* commit murder of *B* ?

2. Issue is, Is the signature on the document that of A ?

Issue No. 2 involves the proof of one fact only.

Issue No. 1 may involve the proof of many facts.

e, g. Was *A* present ?

Could *C* see him ?

Is the bloodstained shirt his ? and so on.

§ Burden of Proving an issue.

3. The framing of an issue presupposes an assertion of the existence of a certain set of facts and circumstances by one party and the denial of them by the opposite party. There are

two ways by which the issue may be adjudicated upon (1) By proving that the circumstances alleged do not exist or (2) By proving that the circumstances alleged do exist. Question is which of the two modes of proving the issue to be adopted—the mode of proving the affirmative or the mode of proving the negative.

4. Where there are no reasons for holding :

(a) that what is asserted is more probable than what is denied

and

(b) where the means of proof are equally accessible to both the parties

then the rule is that the party which alleges the existence of the facts must prove that they exist. The burden is on him who states the affirmative of the proposition. He who denies need not prove that they do not exist

This rule is laid down in Section 101.

5. Reasons why the law requires the affirmative to be proved instead of the negative.

(1) The man who brings another before a judicial tribunal must rely on the strength of his own right and the clearness of his own proof, and not on the want of right or the weakness of proof in his adversary.

Illus. *Midland Rail Co.* vs. *Bromby* —17 C B 372.

Doe vs. *Longfield*—16 M & W 497.

17 C.B. 372
P. 380

(2) A simple negative by reason of its indefiniteness is difficult if not impossible of proof. A person asserts that a *certain event took place,* not saying when, where, or under what circumstances. How can a person disprove that, and convince others that at no time, at no place and under no circumstances has such a thing occurred. The utmost that could possibly be done in most instances would be to show the

impossibility of the supposed event and even this would require an enormous mass of presumptive evidence.

A negative averment must be distinguished from a contradiction of a positive averment, technically known as a "traverse".

Illustrations:

Malicious Prosecution.

In an action for Malicious Prosecutions the Plaintiff makes two main allegations.—

(1) That the Defendant prosecuted him,

(2) That the Defendant had no reasonable cause for the prosecution.

The first being affirmative the second a negative averment. The burden of proof of both of them is on the Plaintiff.

Negligence.

The Defendant did not take reasonable and proper care.

This is not a negative but a negative Averment

6. Two things must be noted with regard to the rule of evidence that the affirmative of a proposition must be proved

12 Mad. 526-15 Jur. 544-545.

What is a traverse.

1. It is a matter which relates to the law of pleadings. Before Judge is asked to decide any question which is in controversy between litigants, it is in all cases desirable and in most cases necessary, that the matter to be submitted to them for decision should be clearly ascertained. The defendant is entitled to know what is it that the plaintiff alleges against him ; the plaintiff in his turn is entitled to know what defence will be raised in answer to his claim. The defendant may dispute every statement made by the plaintiff or he may admit or admit and allege other facts which put a different complexion on the case.

To put it technically a Defendant may either :

(1) Admit

(2) Deny

(3) Deny and allege other facts.

2. When a defendant denies the allegation of the Plaintiff in the Plaint, he is said to traverse it. A traverse is the express contradiction of an allegation of fact in an opponent's pleading. It is generally a contradiction in the very terms of the allegation. It is as a **rule framed in the negative ;** because the fact which it denies is as a rule alleged in the affirmative. These traverses of affirmative allegations must be distinguished from a **negative allegation** which is in truth a positive allegation.

If a party asserts affirmatively, and it thereby becomes necessary to his case to prove that a certain state of facts does not exist, or that a particular thing is insufficient for a particular purpose, and such like—these although they resemble negatives,—are not negatives in reality : they are in truth possible averments, and the party who makes them is bound to prove them.

Plaintiff may have to prove negative in order to prove his positive **assertion.**

A negative averment if in truth it is a positive averment must be proved by the plaintiff.

Sale and Mortgage-Adequacy of price. Price is not inadequate ?

II. To remember that the affirmative and the negative of the issue mean the affirmative and negative of the issue **in substance** and not merely its affirmative and negative **in form.**

Illustrations :

(1) Moody and Robinson 464. *Amos vs. Hughes.*

Fact alleged in the Plaint.

That the defendant did not emboss the Calico in a workmanlike manner.

Fact alleged in the Written Statement.

The Defendant did emboss the Calico in a workmanlike manner. On whom is the burden ? If **form** alone was considered the burden would be on the Defendant. If substance was taken into account the burden must be on the Plaintiff. Although put in the negative he affirms that the workman embossed the Calico in an unworkman like manner.

(2) 7 Carrington and Payne 612. *Loward* vs. *Leggatt*.

Fact alleged by the Plaintiff.

That the Defendant did not repair the premises as bound by the covenant

Fact alleged by the Defendant.
That the Defendant did repair.
In form the burden is on the Defendant.
In substance it is on the Plaintiff.

The Burden of proving the issue in Criminal Trials

1. Section 101 is a general section and applies to both civil as well as criminal proceedings.

Section 105 is another section which relates to the burden of proving an issue as distinguished from the burden of proving a fact but applies to criminal proceedings only.

2. To understand this section it is necessary to know the scheme of the Indian Penal Code. The Indian Penal Code defines various offences such as theft, murder, cheating etc. Some 400 in all. The task of framing definitions which would be exact, neither too wide, nor too narrow has been very difficult and with the best of efforts the authors of the Code have failed to frame exact definitions. They have however erred in making them too broad. Consequently they found it necessary to limit these definitions by enacting exceptions. Some of these exceptions are common to all the offences as defined by the Code. Other exceptions are specifically applicable to a particular offence.

Illustration (1):

(1) Whoever causes hurt 323

(2) Whoever steals 379

Whoever = Any person who does etc.,

Any person = Any person of whatever age so that the definition as given in the section would make even a child 1 year old guilty. But the Penal Code recognises that a child below 7 has no *mens rea* = criminal mind which is the essence of the offence. To exempt children from the liability of an offence it would be necessary to say whoever above 7 years etc., in every section of the Indian Penal Code.

(1) Whoever takes any property belonging to another from his possession without his consent—378.

(2) Whoever wrongfully confines—342.

(3) Whoever enters into or upon property in the possession of another—441.

(4) Whoever assaults or uses criminal force—352.

It is obvious that under these definitions a Bailiff who acted under the order of his superiors in levying the attachment would be guilty of theft /378 and criminal trespass /441. Similarly a police officer who arrested a person in the discharge of his duty would be guilty of assault /353 and wrongful confinement /342.

That was not the intention of the framers of the Penal Code. It recognizes the necessity of exempting Public Servants from the penal consequences of their acts done in discharge of their duty. To exempt public servants from the scope of the definitions of offences it would be necessary to say in each one of these sections "Whoever not being a public servant in the discharge of his duty".

Instead of repeating these limiting words in so many different sections to which they are common the Penal Code has grouped them together in Chapter IV which is called **General Exceptions** and which cover sections 76 to 106.

There are also limiting clauses which apply to some specific offence as defined in the Penal Code.

Illus—

Section 499. Defamation.

Definition is so wide that there are **ten** Exceptions.

The necessity of 9th Exception—protection of interest Such Exceptions are special Exceptions as distinguished from General Exceptions.

Proviso—

Illus *Sec. 92 I. P. C.*

Question is who should prove that the case of the Accused falls within the Exception, General or Special. Exception or the Proviso as the case may be ? The prosecution who alleges that it does not or the Accused who alleges that it does ? **The Answer is given in Section 105.** The burden is on the Accused to prove.

This is a departure from the previous law. Under it the burden was on the prosecution to prove that the case did not fall within the Exception,

§ Burden of Proving an Exception to a Civil Law—

1. There is no specific section in the Evidence Act which regulates the Burden of Proof in respect of an exception to a Civil Law. The rule is however the same as in Criminal Law. Namely that the Defendant must prove that his case falls under the Exception.

Illus—*15 Cal. 555*

> "The suit is governed by Section 37 of **Bengal Act XI of 1859** (Revenue Sale Act)—and that section dealing separately with encumbrance and under tenures, lays down that the Auction purchaser shall be entitled to avoid all under tenures and to eject the holders of them **with certain exceptions,** and then goes on to set out the Exceptions. It appears to us that the presumption is in favour of the general proposition of law laying down that all under tenures are voidable, and that pleading a certain exception is bound to bring himself within it. That being so, **it will be for the Defendant in this case to bring himself within the exception** which he pleads."

§ Burden of Proving an Exception a proviso/or a condition precedent in an Agreement.

1. Distinction between a Proviso and an Exception.

A Proviso is properly speaking the statement of some thing extrinsic of the subject-matter of a covenant which by the terms of the covenant is to go in discharge of that covenant by way of defeasance.

An Exception is a taking out of the covenant some part of the subject-matter of the covenant.

Whether particular words form a proviso or an exception will not in any way depend on the precise form in which they are introduced, or the part of a deed in which they are found.

2. The rule of pleading is that a Plaintiff need never state a proviso in his plaint, but he must always state an exception.

Aga Syud Saduck vs. *Raji Jackariah Mahomed.*

2 Ind. Jur. N.S. 308(310)

310. Markby J.

In the Note to *Thursby* **vs.** *Plant'* 1 Wms. Saund. p. 2336 it is laid down that a proviso is properly the subject of some thing extrinsic of a subject-matter of a covenant by way of defeasance. An exception is a taking out of the Covenant some part of the subject-matter of it. Of these be right definitions a Plaintiff need not never state a proviso, but always state an exception.

3. Although this is laid down as a rule of pleading it also holds good as a rule of burden of proof. So if a clause in an instrument such as a policy of assurance, be an exception, the Plaintiff must only state it, but show that it is not applicable. If it be a proviso the Defendant must state it, and show that it applies.

2 Ind.Jur.N.S. 308,310

2. Ind. Jur. N. S. 308.

1867

A sued B. & Co. on a policy of insurance on the ship "Alaya" from noon of the 24th November 1865 to noon of the 24th February 1866 "and to all ports and places", The words "and to all ports and places" were written, the rest being printed. B & Co. in their Written Statement admitted the policy, but set up the following exception : "All risks or losses arising from the detention *etc.*; also from storms and gales of wind, or other perils of the sea; while touching or trading on the Coast of Coromandel from Point Palmyras to Ceylon and within surroundings between the 15th October and 15th December inclusive are here by excepted, which risks or losses are to be borne by the assured and not by the Assurers, notwithstanding anything to the contrary hereinbefore expressed."

3. Akiks

4. Condition Precedent = Proviso.

In this connection the law of evidence has appointed three principles.

I. The burden of proof of a fact is on a person who wants to benefit himself by the special facilities provided by the law of evidence for the proof of that fact.

Section 104 is an illustration of this principle.

2. § Burden of proving a particular fact.

1. The rule is the same as in the case of burden of proving an issue. That is the burden of proving a particular fact is on the party who affirms the existence of the fact and not upon the party who denies it. The rule is contained in Section 103 and the reasons of the rule are the same in both cases.

2. There are however certain facts the burden of proving which is placed by law upon a particular person irrespective of the question whether he asserts its existence or denies its existence. Sections 104 to 111 specify the cases in which the law of evidence places the burden on particular persons.

3. The principles underlying these sections and which justify this departure from the general rule relating to Burden of Proof seem to be four.

I. The burden of proving a fact should be on a party who wants to take the benefit of the **special** facilities provided by the law of evidence for the proof of that fact.

II. Where parties are unequal in their relative position the burden of proving a particular fact should rest on the one who is comparatively in a better or stronger position.

III. Where things have continued to exist the burden of proving their discontinuance is on the party who alleges discontinuance.

IV. Where one fact is a mere legal incident of another fact the burden of proving that the incident should not be attached to the fact is on the party who alleges that it should not be.

§ Sections illustrative of the First principle.

1. Section 104 is an illustration of the First Principle. This deals with the burden of proof of a fact, the proof which is a necessary prerequisite for the proof of another fact.

2. The law of evidence lays down certain conditions which must be fulfilled before evidence of a particular fact is given. Similarly the law of evidence lays down certain conditions which must be fulfilled before a particular method of proving a fact can be resorted to.

Illus-I.

Nothing is evidence unless it is given before and in the presence of the Court. Ordinarily therefore the statement made by a person who is dead is not evidence. The law of evidence however permits evidence being given of anything said by a deceased person if it is relevant to the issue on the condition that the fact of his death is proved.

Illus-II.

The law of Evidence requires that the contents of a document must be proved by the production of the original. The law however permits secondary evidence being given on the condition that the loss of the original is proved.

3. The question is who must prove the fact of death or the fact of the loss of the original document ? In general who must prove these prerequisites ? Section 104 lays the burden on the party who wishes to profit by these special facilities.

§ Sections illustrative of the Second Principle.

1. Section 106 and 111 illustrate the Second Principle.

Section 106.

1. This section deals with the burden of proof of a fact which is especially within the knowledge of one of the Parties.

(i) If A alleges a certain fact and if B denies it then by virtue of the rule contained in Section 103, A must prove it because A affirms it.

(ii) But if the fact is especially within the knowledge of B then by virtue of this section the burden of proof in respect of it rests on B.

2. Illustrations.

22 Cal 164.

Haradhan had 2 daughters—twins about a year old—sold one of them to Karuna a prostitute for Rs. 9 and within 10 days sold to Karuna who she had brought up from her infancy and who was then living with her and leading the life of a prostitute.

Question. On a prosecution under Sec. *372/373* for buying and selling minors for prostitution the question was who should prove that the intention was that the girls were to be used for prostitution. By the accused-being a matter within their knowledge.

23 All 124.

Several persons were found at 11 O'clock at night on a road just outside the city of Agra all carrying arms (guns and swords) concealed under their clothes. None of them had a license to carry arms, and none could give reasonable explanation of his presence at the spot.

On a charge under Section 402 held burden of intention on the Accused.

Section 111.

1. This section deals with the burden of proof in respect of the *good faith* of a transaction.

2. **Definition of good faith.**

(1) Good faith is not defined in the Evidence Act.

(2) It is defined in Section 52 of the Indian Penal Code. Nothing is said to be done or believed in 'Good faith which is done of believed without due care and attention.

(3) It is also defined in Section 3 (20) of the General Clauses Act X of 1897.

"A thing shall be deemed to be done in good faith where it is in fact done honestly whether it is done negligently or not".

(4) The difference between the two definitions is that the *question of honesty* is immaterial to good faith as defined by the Penal Code. But it is the very core of the definition as given in the General Clauses Act.

(5) The term good faith as used in the Evidence Act is used in the sense in which it is used in the General Clauses Act.

3. The General rule regarding Burden of proving good faith.

(i) It is a general principle of law to hold that all persons in their dealings act fairly. Nothing dishonourable or odius is to be attributed to any person. Law will not impute vice and immorality. That being so the person who wishes to impeach the conduct of any person as being dishonest or unfair has the burden of proving dishonesty and unfairness. In other words the burden of proof in respect of good faith is upon the person who allege the absence of good faith. The motive must be proved.

(ii) Section 111 enacts an exception to this general rule and prescribes the circumstances in which a person must prove affirmatively the presence of good faith.

If the good faith of a transaction between two parties is questioned by one of them and the two are so related that one stands to the other in a position of *Active confidence* the burden of proving good faith affirmatively is on the person who stands in the position of active confidence.

This Exception applies only where the two parties to the transaction are so related that one stands to the other in a position of active confidence.

(IV) Meaning of the "Position of Active Confidence" :

(i) Position means legal relationship.

(ii) Active confidence means habituated to consult and act on advice.

Position of Active confidence therefore means such legal relationship between the parties as gives rise to the habit in one party to consult the other for the protection of his interest and imposes upon the other the duty to see that his advise is such as will safeguard his interest.

The section contemplates *legal relationship* between the parties such that it becomes the duty of the person taken in confidence to protect the others interests.

Coulson vs. *Allison* *2.D.F.&J. 581.*	The rule applies because parties were husband and wife.
Hargeave vs. *Everard* *6.Ir.Ch.R.278.*	The rule was not applied because parties were not husband and wife but mistress and paramour.

A transaction between *Trustee and beneficiary, solicitor and client, father and son or husband and wife* would be subject to this rule if the issue of good faith were raised.

(V) The rule although confined by the Section to *cases* where one person stands to the other in a position of active confidence it is extended by the Court to all cases where a person has domination over another and is in a position to exercise undue influence.

Sections 107-108.

1. They must be read together because 108 is only a proviso to the rule contained in Section 107.

2. The sections do not deal with the question, how long was a person alive.

3. The sections do not deal with the question at what *time* he died.

4. The sections do not deal with the question whether he was alive or dead at some antecedent date.

5. The sections deal with the question whether a person is alive or dead at the time when the question is raised, that is at the date of the suit.

Sections illustrative of the third Principle.

Sections 107, 108 and 109

Sections 107 deals with the burden of proof where the *question is whether a man is alive or dead.*

According to this section where it is proved that the person in question was alive within the last 30 years then the burden is upon the party who asserts that he is dead. Where it is not proved that the person in question was alive within the last 30 years then the burden is on the person who alleges that he is alive.

Section 108 deals with the burden of proof where the question is whether the man who has not been heard of is alive or dead.

Acording to the section :

(1) if the man is not heard of for *seven* years

and

(2) by those who would *naturally* have heard of him the burden is upon the party who *affirms that he is alive.*

Comment—

The death of any party once shown to have been alive is a matter to be determined by the Court. As the presumption is in favour of the continuance of life the *onus* of proving the death lies on the party who asserts it. But the presumption of continuance of life ceases at the expiration of 7 years from the period when the person in question was last heard of. And the *burden* of proving that the person was alive within the seven years is upon the person asserting it

But a Court may find the fact of death from the lapse of a shorter period than seven years, if other circumstance concur.

Re.: Walker (1909) P. 115.

Application of Sections 107-108.

The question for which provision is made in these two sections is whether a person is alive or dead at the time the question is raised. These sections do not apply where the question is whether the man died at a particular time. If any one seeks to establish the precise time of death the burden of proof is upon him.

Section 109. This section deals with the burden of proof as to continuance or discontinuance of three relationships.

(1) Partners.
(2) Landlord and tenant.
(3) Principal and agent

This section provides that once it is shown that two persons have stood in the relationship of partners, Landlord and Tenant or Principal and Agent the burden of proving that they have ceased to stand in that relationship is on the party who alleges that they have ceased.

§ Section illustrative of the 4th Principle—

Section 110. This section deals with the burden of proof regarding title to property when the competition is between a person in possession and the owner who is out of possession.

1. The rule laid down in Section 110 is that the burden of proof that the person in possession is not the owner is on the person who alleges that he is not the Owner.

Reason for the Rule—

Ownership chiefly imports the right to exclusive possession and enjoyment of a thing. The owner in possession has the right to exclude all others from possession and enjoyment of it; and if he is wrongfully deprived of what he owns, he has the right to recover possession of it.

Ownership also imports the power to dispose of property, to sell, mortgage or donate.

Right to possession and Right to dispose of are therefore incidents of Ownership. Where there is ownership there goes with it the right to possession and the right to dispose.

The law therefore holds that a person would not be in possession of property unless he was the owner and places the burden on his opponent.

The principle of the section does not apply in the following cases—

(i) Where the possession is merely judicial as distinguished from actual present possession.

(ii) Where possession is obtained by fraud or force.

BURDEN OF PROOF

1. The Law requires the person to discharge the Burden of Proof which is placed upon him.

2. In discharging the Burden of Proof attention must be paid to two considerations.

(i) There are Matters of which Proof is not required.

(ii) There are Matters the Proof of it is not allowed.

3. We must therefore proceed to consider these matters and the rules regulating them.

I. BURDEN OF PROOF

(i) Matters of which Proof is not required.

§ Facts of which Proof is not required.

1. Matters of which Proof is not required fall under three heads:

(1) Facts Judicially noticed.

(2) Facts admitted by the Parties.

(3) Facts the existence of which is presumed by law.

§ (i) Facts judicially noticed.

1. Sections 56 and 57 deals with facts judicially noticed.

2. Section 56 says no fact of which the Court will take judicial notice need be proved.

3. Sec. 57 lays down 13 matters of which the Court *must* take judicial notice.

4. Principle of the Secion. Certain matters are so notorious and are so clearly established that it would be useless to insist that they should be proved by evidence.

Illus.—

(1) Commencement and Continuance of hostilities.

(2) Geographical Divisions.

5. The last two paras are important and read with section 56. They furnish a clue to the proper understanding of them. The effect is that when a matter enumerated in Section 57 comes into question, the parties who assert the existence to the contrary need not produce any evidence in support of their assertions. The judge must come to a conclusion without requiring any formal evidence.

(1) The Judge's own knowledge may be sufficient. If it is not he must look the matter up.

(2) The Judge can also call upon the parties to assist him, if he thinks it necessary.

(3) The Judge in making this investigation is emancipated entirely from all the rules of evidence laid down for the investigation of facts which the law require s a person to prove.

(ii) Facts admitted by parties.

Section 58

1. There are two sorts of admissions which must be distinguished.

(1) Formal admissions made touching matters related to a proceeding in a Court and made intentionally by parties so as to dispense with their Proof.

(2) Informal admissions alleged to have been made by a party to the proceedings but not made in the course of the proceedings.

2. Section 58 applies only to formal Admissions.

Formal admissions may be made by parties in 6 different ways :

(i) On the pleadings.

(ii) In answer to interrogatories.

(iii) In answer to a notice to admit specified facts.

(iv) In answer to produce and admit documents.

(v) By the Solicitor of a party during the litigation.

(vi) In open Court by the litigant himself or by his Advocate.

3. Proof of such facts would be futile. The Court has to try the questions on which the parties are at issue and not on which they are agreed.

4. Applicability of Sec. 58 to criminal trials is a matter on which there is a difference of opinion.

(i) **Nortion** says that it does not apply to criminal trials.

(ii) **Cunningham** says that it does.

30 Bom. L. R. 646.

Section 58 makes no exception in regard to criminal proceedings.

Rat. Un. Cr. C. 769.

Section 58 makes no exception in regard to Criminal Proceedings.

39 Mad. 449.

On general principals of Jurisprudence Sec. 58 ought not to be applied to criminal trials.

"The question remains whether the Provisions of the Act are exhaustive and whether we can invoke the aid of the principles of Jurisprudence or of English Law as supplementing and explaining the rules of Evidence given in the Act." 12 All. 1. English rules of Evidence apply.

The rule is not an absolute rule. The section provides that a fact which is admitted may be required by the Judge to be proved by evidence by the party on whom the Burden of Proof lies.

This is a safeguard intended to protect simple and ignorant persons against mistakes.

It is probably under this proviso that admissions in Criminal trials are not permitted.

§ Facts the Existence of which is presumed by Law.

1. Definition of presumption.

A presumption is a conclusion or inference drawn from a certain fact.

2. Principle underlying the rule of Presumption :

(1) The universe is no doubt composed of diverse elements and the motives that operate upon people are different.

Notwithstanding this there is a certain amount of regularity and uniformity.

(2) With respect to **things** the order and changes of the seasons, the rising, setting and the course of heavenly bodies, and the known properties of matter-magnetism-specific-gravity show a certain regularity and uniformity of movement and occurrence.

(3) With respect to **persons** the natural qualities, powers and faculties which are incident to the human race in general are more or less uniform.

(4) With respect to **Conduct** of men more or less the uniformity.

They are actuated by the same uniformity.

3. Given this uniformity it is possible to say that given one thing another can be said to follow.

4. It is on this principle Section 114 is based.

1. It empowers the Court to presume the existence of a fact if that fact is a **likely result** of a particular fact.

2. The test is—

(i) common Course of natural events.

(ii) human conduct.

(iii) Public and private business.

3. It gives 9 illustrations of what would be likely results of certain facts.

4. **Explain.**—Illustrations (not given in MS—ed)

5. An event likely in one circumstance may very unlikely in another circumstance. Therefore in drawing a presumption the Court must have regard to the facts of the particular case.

Explanations to illustrations (not given in MS—ed)

6. There can be no general codification of presumptions because the likely result must vary under circumstances.

7. The effect of presumption is to relieve a person from the Burden of Proof.

8. Presumption of Law and Presumptions of fact.

9. Rebuttable and Irrebuttable Presumptions.

Norton P. 381.

II. Analogous presumptions are maxims of law. They are also called presumptions in the loose sense of the word.

1. There are certain maxims of Law which are also called Presumptions.

2. Illustrations of Maxims of Law :

(1) The law will presume that every body knows the law.

(2) The law will presume that every person intends the natural consequences of his acts.

(3) The law will presume that an accused person is innocent.

(4) The law will presume that every human being is endowed with the power of understanding.

(5) The law will persume that no man will throw away his property for instance, by paying money not due.

(6) The law will presume that money advanced by a Parent to his child is intended as a gift, and not as a loan.

(7) The law will persume that a parent prefers his own children to those of others.

These maxims are related to burden of Proof. They help to fix the burden.

§ Presumptions as to Documents 79-90

1. Presumption as to the genuineness of certified copies. 79
2. Presumption as to the genuineness of documents Produced as record of evidence. 80
3. Presumption as to the genuineness of gazettes, Newspapers. 81
4. Presumption as to documents—In England without proof of seal or signature. 82
5. Presumption as to maps or plans made by authority of Government. 83
6. Presumption as to books of law and report of decisions. 84
7. Presumptions as to powers of attorny. **85**
8. Presumptions as to certified copies of foreign Judicial records. 86
9. Presumptions as to books, maps and charts. 87
10. Presumptions as to telegraphic messages. 88
11. Presumption as to attestation and execution of documents not produced. 89
12. Presumtion as to documents 30 years old. 90

Burden of Proof

(ii) Matters of which Proof is not allowed

1. § Matters which parties are debarred from asserting. (conclusive evidence).
2. § Matters which parties are estopped from proving. (Estoppel).
3. § Matters stated without prejudice.
4. § Matters which are irrelevant.

1. § Matters which parties are debarred from asserting—

Matters which parties are debarred from asserting are spoken of in the Evidence Act as Matters of Conclusive proof or commonly spoken of as irrebuttable presumptions or presumptions of Law.

They are dealt with in Sections 41, 112 and 113.

II. Section 112

1. This section deals with the Question :

How to prove that A is the legitimate child of **B** and his wife **C** ?

2. There are two ways of proving this fact according to two different contingencies.

(i) If the contingency is that the child is born during wedlock.

(a) Prove lawful marriage between **B** and **C**.

(b) Prove the Existence of Marital relations between **B** and **C at the date of the birth of A.**

On proof of these two facts the Law will conclude that **A** is the legitimate son of **B** and **C**.

(ii) If the Contingency is that the child is born after dissolution of the marriage between **B** & **C**—Either by death of the father or divorce.

(a) Prove that **A** was born within 280 days after the dissolution of the marriage by death or divorce.

(b) Prove that the morther had remained unmarried during that period of 280 days.

On Proof of these two facts the law will conclude that **A** is the legitimate son of **B** and **C**.

Points to be noted

1. The deciding factor in the question of legitimacy is not the time of the conception of the child but the time of the birth of the child. Whoever was the husband of the woman at the time of the birth of the child is the father.

Illus.

1. *Pal Singh* vs. *Jagir. 7 Lahore 368.*

Harnam Kaur married Hari Singh. Hari Singh died on the 10th January 1919. Harnam Kaur married Sohan Singh on

25th February 1919. Jagir was born to Harnam Kaur on the 17th October 1919 i.e. 279 days after the death of Hari singh and **198** days **after her marriage to Sohan Singh.**

On a question being raised whether Jagir was the son of Hari Singh, **Held** that he was the son of Sohan Singh and not of Hari Singh.

2. *Palani* vs. *Sethu. 49 Mad. 553.*

Pechi Ammal married Subramanya in October 1903. That marriage was dissolved in June 1904.

Pechi married Thirumani in July 1904.

Palani was born during the second week in September 1904 i.e. 4 months after the dissolution of Pechi's marriage with Subramanya and 3 months after her marriage with Thirumani.

Whose son is Palani ? of Subramanya or Thirumani.

Held he was the son Thirumani.

2. This is treated as case of conclusive proof. This is treated so not because the truth is beyond dispute. A woman although married lawfully to one man may be in the keeping of another and her children may well in fact be the children of her paramour. This is so treated because for reasons of public policy or in the interests of Society an artificial probative value is given by the law to certain facts and no evidence is allowed to be produced with a view of combating that effect. Under Section 112 artificial probative value is to the following facts.

(1) The fact of marriage.

(2) The fact of access.

So that where these two facts exist the law concludes that issue born must be legitimate i.e. it must be issue born of the husband.

(2) This conclusion can be demolished only by giving evidence of non-access.

It must be proved that the parties to the marriage had no access to each other at any time when the child could have been begotten.

Meaning of non-access.

1934. 38 Bom. L.R. 394.

Karapaya vs. *Mayandi.*

Access does not imply actual cohabitation. It means no more than opportunity of intercourse.

Kerapaya, a Madras Hindu acquired considerable property in Burma. He died a lunatic in 1923.

Karapaya first married Karapayi and then married Nachiama. Kerapaya lived with Nachiama at Tamagyo while Karayappi was living at Houlmein with her mother and brother.

In December 1911 an agreement made between (Left incomplete—ed.)

(3) The conclusion cannot be demolished by giving evidence of inability to cohabit.

29. I. A. 17
1901

Narendra vs. *Ram Govind.*

Upendra was married to Tilottama. Upendra died on July 15 from the effects of a Carbuncle in his back, from which he had been suffering for sometime.

After the death of Upendra, Tilottama gave birth to a son Narendra on April 18,1887 i.e. 9 months 10 days or 280 days after the death of Upendra.

There were three questions to be considered :

1. Was Narendra the child of Tilottama—Upendra ?

2. Was he born within 280 days from the death of Upendra ?

3. Is it proved that he and she had no access to each other at any time when the appellant could have been begotten ?

On the last issue the evidence was as follows:

Tilottama was married when she was quite a child and lived with her parents. But shortly before his death in July 1886 she went to live with her husband. How long before it is not clear. Some witnesses said five or six days others said ten or twelve days.

The important circumstances in the case were two :

(1) That Upendra died from the effects of a Carbuncle from which he had been suffering for a fortnight.

(2) That Upendra had made will on the 14th July 1886 appointing Tilottama as his Executrix and directing her to adopt a son.

The contention was that if he was ill he could not have cohabited. The contention was negative.

(3) Inability to cohabit must be distinguished from genital inability. *1935.* (All India Reporter) *P.O. 199* (for Physical inability).

Query-If he was impotent.

The Section abrogates the rules of Hindu and Mahomedan Law regarding Legitimacy. *10. All. 289.*

1. According to Mahomedan Law a child born six months after marriage or within two years after divorce or death of the husband is presumed to be her legitimate offspring.

2. According to Hindu Law it is ten months after divorce or death of the husband.

The section does not prohibit a person born after 280 days from proving he is the legitimate son. Only the burden of proof is upon him.

24 All. 445. 357 days after the death of the father.

There is a difference between the English and Indian Law of Evidence regarding the competency of the Husband and wife on the issue of access when the question of the Legitimacy of the child arises.

1. Under the English Law they are incompetent.

2. Under the Indian Law they are competent.

38 Mad. 466.

28 Bom. L.R. 207.

Section 113

1. The section deals with the Burden of Proof regarding the cession of a territory.

How is it to be proved that a certain territory which was once a part of British India has ceased to be part of British India.

The question is not merely academic. It is of great practical importance. It goes to the root of the question of the jurisdiction of the Court. If a territory is not a part of British India then it is not subject to the Jurisdiction of any Court.

2. Provision was made in Section 113. It said that a notification in the Gazette of India that a British Territory has been ceded to any native State Prince or Ruler should be taken as a conclusive proof that a valid cession of such territory took place at the date mentioned.

3. This Section has been declared to be *ultra vires* of the Indian Legislature and therefore void and of no legal effect by the Privy Council.

1. *Bombay 367 P.O.1876* *Damodar Gordhan* vs. *Deoram Kanji.*

The Governor General in Council being precluded by the 24-25 Vic. O. 67 Sec. 22 from legislating directly as to sovereignty or dominion of the crown on any part of its territory in India or as to the allegiance of British subjects cannot by legislative Act (E. G. Evidence Act. S. 113) purporting to make a notification in the Government Gazette conclusive proof of a cession of territory, exclude judicial enquiry as to the nature and lawfulness of that cession.

Judgements as conclusive Proof.

1. Just as certain facts are deemed to be conclusive proof of certain other facts, similarly the Evidence Act treats **certain** Judgements as conclusive on certain issues. **Sec. 41.**

2. The judgements which are declared to be conclusive are :—

(1) **Final** Judgement, order or decree of a **Competent** Court in the exercise of

(1) Probate
(2) Matrimonial
(3) Admirality
(4) Insolvency Jurisdiction

which confers a legal character or takes away a legal character or declares a person to be entitled to a legal character or to a thing not against any specified person but absolutely.

Are conclusive Proof:

(1) That the legal character as given or taken away.

(2) That it is given or taken away on the date of the Judgement.

Section 41.

This section deals with use of Judgements of Courts of Law for the proof or disproof of certain questions.

Question is:

(1) The right of a person to a certain status

(2) When did such right accrue to him.

Question is :

Did (1) A particular person cease to have a status

(2) If so, when.

Question is whether any particular person was entitled to a certain property.

The Section declares that **certain Judgements** will be conclusive evidence of these facts.

What are these Judgements :

(1) It must be a Judgement of a **Competent Court.**

(2) It must be a Judgement in the exercise of

(i) Probate

(ii) Matrimonial

(iii) Admirality

(iv) Insolvency

1. Which declares conferring or taking away of a legal character on or from any person.

2. Which declares a person entitled to any specific thing not against any specified person but absolutely.

3. If it is a final Judgement, order or decree.

Probate Jurisdiction.

The Courts exercise testamentary and intestate jurisdiction under:

(1) Indian Succession Act.

(2) The Hindu Wills Act.

(3) The Probate and Administration Act.

Matrimonial Jurisdiction.

Exercised under the Indian Divorce Act and other Acts relating to marriage and divorce.

Admirality Jurisdiction.

Letters Patent of the High Court and the Colonial Courts Admirality Act. 1890.

Insolvency Jurisdiction.

Charters and the Insolvency Acts.

§ Matters which parties are estopped from Proving.

1. The law of Estoppel is contained in Sections 115, 116, 117. Section 115 states the general rule of estoppel. Sections 116 and 117 enact particular kinds of estoppels.

2. Section 115.

(i) Comparison of Section 115 with Section 31.

Estoppel is like an Admission inasmuch as it is a statement of a fact. Most admissions can be withdrawn by the party who makes them. The fact that they were made remaains, but the party who made them can be heard to explain that he made them rashly and carelessly or under an honest misapprehension. Even he cluld be heard to say that he knew what he said to be false. But a statement may be made by one person to another in such an unequivocal manner and under such circumstances that it has a decisive effect on the conduct of the other. The law will not permit a person making such a statement to contradict it. The margine between an estoppel and an admission is very narrow and the answer to the question whether a statement is a mere admission or is a estoppel depends upon the nature of the statement and the circumstances appertain to it.

(ii) What are the legal requirements of the Rule of Estoppel ?

The rule of Estoppel comes into operation when the three following conditions are satisfied. *37 Bom. L. R. 544 P. C.*

(i) A statement amounting to a representation of the exsitence of a fact has been made by the defendant or an

authorised agent of his to the Plaintiff or some one on his behalf.

(ii) With the intention that the Plaintiff should act upon the faith of the statement.

and

(iii) The Plaintiff does act upon the faith of the statement.

§ Statement must amount to representation.

(1) Representation may be by **word** or by **conduct,**

A. If it is by word it may be **active misrepresentation** made deliberately with a knowledge of their falsehood.

Illus.-

McCance vs. *London and Nother Western Railway Co., (1861)7 H. & N. 477.*

M entered into a contract with the Railway Co., to carry his horse in trucks which should be reasonably fit and proper for the carriage of horses from Edge Hill near Liverpool, to Wolverhampton. The Railway agreed to provide trucks which should be reasonably fit and proper.

M filled in a declaration form in which he stated that the value of a horse did not exceed £10 per horse. Under the system followed by the Railway there were modes of transporting horses. One was to send them in trucks allowing the owner to place as many horses as he liked in each truck. The other was to send them in horse boxes, each horse being placed in a separate stall. The rate of carriage by the latter mode being three times as much as when carried by the former mode. There was a further rule that the Railway would take horses above the value of £10 in trucks.

In transit some horses were injured owing to the defective state of the trucks provided by the Railway. The damage sustained by M on the basis that the value of each horse was £10 came to £25 which amount the Railway Company was agreeable to pay as they admitted that the trucks were defective. The Plaintiff claimed that the real value of a horse was £40 and the damages came to £55.

This is a case of active misrepresentation.

Illus. (2) Munnoo Lal vs. *Lalla Choonee Lal.*

1. I.A. 144

Reep Singh was in debt but possessed considerable Estate. M had been his Banker. On 9th October 1863 M obtained a mortgage from R of a property to secure a debt of Rs. 20,000 owed by R. On 9th August 1863 R sold the same property to C. When negotiations for the purchase took place between R and C, M was present and took part in same and in answer to inquiries by C gave him to believe that he had no lien upon the Estate.

In 1868 M filed a suit against C to enforce the payment of his mortgage bond. He was estopped.

This is also a case of active misrepresentation.

B. Representation may be **innocent misrepresentation**

Illus. *Gould* vs. *The Bacup Local Board.*

(1881)50 L.J.(M.C.)44.

Certain premises belonging to Gould were kept in a very insanitary condition. The Board asked him to do certain improvements which he refused to do. The Board then served a noice upon him staring that if he did not carry out the improvements within a given time the Board would execute them.

There were two modes of recovering the expenses which were prescribed by the Act, one was by Section 213 and another by Section 240. Section 213 allowed the Board to recover them by additions to the local rate levied by the Board and Section 240 allowed them to recover them independently in lump sum. In the notice served upon Gould it was stated that the recovery would be under Section 213. But in the suit the Board sought to recover the amount as provided by section 240. The Board was estopped. This is a case of innocent misrepresentation.

(2) Representation may be by words or may be by silence. Silence under certain circumstances may be eloquent and may amount to a representation as good and as real as is made by the spoken word.

But every case of silence cannot be taken as equivalent to speech. Because the law does not require a person to speak out what is in his mind on each and every occasion. The law requires

a person to speak only when there is a duty upon him to speak and to disclose his mind. Otherwise silence is golden.

Silence therefore to raise an estoppel must imply an obligation to speak. In considering the effect of silence it has to be seen whether there was any occasion for words and any reasonable occasion for silence. This ought to be done before relying on silence as a legitimate ground for inference.

(1896) A. C. 231 (238)
2 Br. C.C. 400(419)
6 Bom. L.R.

Illus. **(1) Silence no ground for Estoppel.**

10 Bom. L.R. 297.

A decree was obtained against the father by a judgment creditor. In execution the property was managed by the Collector and the proceeds were sent to the creditor. While this was going on, the father died and the son inherited the property. The Joint Creditor sought to execute the decree against the son who contended that he was not liable as the debts were improper. It was contended that the son was estopped because his silence was representation that he accepted the decree ; Held that it was not because there was no duty.

Illus. **(2) Silence ground for Estoppel**

15 I.A. 171.

Sale by Court in Execution proceedings by a proclamation which described the rights of the Judgment-debtor very imperfectly. The result is that the property worth of Rs. 40,000 sold for Rs. 20,000. Suit was brought by the Joint Debtor to set aside the sale. Contention was that *silence was Estoppel.* Held it was, as there was a duty to come forward and get the proclamation corrected.

Representation may be by conduct

1. Conduct may amount to representation or it may not—

(i) Where it does amount to representation 19 I. A. 203.

(ii) Where it does not. 19 I. A. 221.

II. Conduct is either Active or Passive.

Passive conduct is either

(1) Indifference.

(2) Acquiescence.

Passive conduct to raise an estoppel must amount to acquiescence. It must not merely be conduct of indifference.

Conduct of Acquiescence may be described as follows—

> "If a person having a right and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce a person committing the act, and who might otherwise have abstained from it, to believe that he asserts to its being committed, is a conduct which amounts to conduct of acquiescence".

2 Bh. 117 (123)41 E.R. 886.

Imp. 45 Bom. I. L R. 80.

14 All. 362 (364).

Acquiescence may occur while the act acquiesced in is in progress or it may occur only after it has been completed.

For the purposes of Estoppel it must occur while the infringement is in progress. *Ch. D. 286 (314).*

Points to be noted.

1. Misrepresentation must be as to existing facts and not of mere intention. *5 R. L. Cases 185.*

Illus.—

> I. A person has a legal right but between the time of its creation and that of his attempt to enforce it, he has made representation of his intention to abandon it.

2. There can be no estoppel where the truth of the matter is really known to *both parties.*

30 Cal. 539 P. C. Mohori Bibee vs. *Dharemdas Chose.*

On the 20th of July 1895 Damodar Das executed a mortgage in favour of one Brahma Dutt, a money lender. Brahma Dutt was absent throughout the transaction and the transaction was carried through by his attorney Kedar Nath, the money being found by Dedraj the local manager of Brahma Dutt. While the transaction was going on, the mother of Damodar Das wrote a letter to Kedar Nath the attorney that Damodar Das was a minor and any one advancing him any monies would do so at his own risk.

On the date of the mortgage Kedar Nath took a long declaration from Damodar Das that he was major.

On the 10th September 1895 the mother filed a suit for cancellation of the Deed of Mortgage on the ground that D was a Minor.

Contention of B was that D was estopped. Held he was not because facts was known to **B.**

Actually knowing the fact is different from having the means of knowing it.

L. R. 20 Ch. D. 1. Redgrave vs. *Hurd.*

The Plaintiff represented that his business brought in about £ 300 a year and produced 3 Summaries showing about 2/3rd of that together with some papers which Defendant did not examine. Upon the faith of this Defendant signed an agreement to purchase the Plaintiffs business and paid a deposit. Finding the business worthless he refused to complete and Plaintiff sued him for specific performance. Contention of Plaintiff was that Defendant was estopped from alleging that the representation of Plaintiff was false because he had the means of knowing the truth.

Jessel M. R. P. 21.

> "Where one person induces another to enter into a contract by a material representation which is untrue, it is no defence to an action to rescind the contract that the person to whom the representation was made, had the means of discovering or might with reasonable deligence have discovered that it was untrue. It must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms or shewed clearly by his conduct, that he did not rely on the representation."

II. Second Element in the rule of Estoppel the *intention* that the Plaintiff should act upon the faith of the statement.

It is *not* necessary that the party making the representation must have been under no mistake himself.

It is not necessary that the party making the representation must have acted with the intention to milead or to deceive.

19 I.A. 203.

But it is necessary that the party making the representation must have the intention that the Plaintiff should act upon the faith of the representation.

How to prove intention ?

Intention is used in two different senses :

(1) It is used to indicate as a presumption of law. A man is presumed to intend the natural or necessary consequences of his act.

(2) Intention is used to indicate a specific existing state of mind in a person.

This specific state of mind must be proved as a fact like any other fact and cannot be presumed.

Illus.—

(1) Section 225, I. P. C. whoever intentionally offers.

(2) Section 124, I. P. C whoever with the intention.

Intention here is used as a presumption of law and is not used in the second sense.

It is not therefore necessary to prove intention that the party should act as a specific fact.

If a reasonable man would take the representation to be true, and believe it was meant that he should act on it, the requirement as to intention would be satisfied.

19 I.A. 203 (219).

III. The third element in the rule of Estoppel is that the party to whom the representation was made must have acted upon the faith of it.

1. This element is really the foundation of the law of Estoppel and explains the principle underlying it. The principle underlying the rule of Estoppel is that it must be inequitable unjust; that if one person by a repersentation made or by conduct amounting to representation has induced another to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it.

2. The reason of the rule is that the man has acted upon it and altered his position. To amount to estoppel the statement must have been acted upon by the party to whom it was made.

14 Bom. 312.

13 Moo I.A. 585 (599).

Limitation on the rule of Estoppel.

1. It cannot override the law of the land.

(i) Minor—represents himself as Mojor—not estopped from proving minority.

(ii) Corporation—does Acts which are *ultra vires*—not estopped from proving that they were beyond its power.

Other distinctions between **Admissions** and **Estoppel.**

1. An admission does not prevent the party from proving that the admission is untrue. An Estoppel prevents the party from doing so.

2. An admission can be taken advantage of by any person other than the one to whom it was made. An Estoppel can be taken advantage of only by the party to whom it was made. As against a stranger he can deny its truth.

5 *W. R. 209.*

5. A. R. 209.

Plaintiff alleged that he had purchased the property in the suit for Rs. 10,000. Pressed for money he subsequently mortgaged it to his mother. That he redeemed the Mortgage a year after and took possession of the property.

The Defendant had obtained a decree against mother of the Plaintiff and in execution and satisfaction of the Decree had the property sold by Court Sale and purchased it Benamee and Plaintiff was ousted. The Plaintiff filed a suit for the recovery of the property.

The Defendant contended that Plaintiff was estopped from proving that he was the Owner because in a former suit Plaintiff had admitted that his mother was the Owner to that suit Defendant was not a party. Held there was no Estoppel.

Difference between Estoppel and Conclusive Proof.

1. Estoppel can be waived by the party in whose favour it operates. But conclusive proof cannot be waived.

Difference between Res Judication and Estoppel.

Res Judication prevents a man avering the same thing twice over in successive litigations.

Estoppel prevents a man from saying one thing at one time and the opposite at another. *36 Bom. 214.*

English and Indian Law of Estoppel.

1. Under the English Law Estoppels are usually classed under three heads.

(i) Estoppel by Record.

(ii) Estoppel by Deed.

(iii) Estoppel by Conduct

2. Estoppel by Record means estoppel by the Judgement of a competent Court.

(i) Estoppel by Record is recognised by the law of India. It is dealt with:

(a) By the Code of Civil Procedure. *Sections 11-4.*

(b) By the Evidence Act. *Sections 40-44.*

3. Estoppel by Deed.

1. Under the English Law a party to a deed cannot, in any action between him and the other party, setup the contrary of his assertion in that deed. This rule affords an illustration of the exaggerated importance of a 'seal' in English law. Neither sealing wax nor wafter is necessary to constitute a seal. Apparently, a smudge of ink on document purporting to be a deed is a seal if so intended, and it makes a greater importance in law than a deliberate and identifiable signature. **There is no estoppel in the case of ordinary signed documents.**

2. The strict technical doctrine of Estoppel by Deed cannot be said to exist in India.

3. But while the technical doctrine has no application in this country, statements in documents are, as admissions, always evidence against the parties. In some cases such a statement amounts to a mere admission of more or less evidential value according to circumstances, but not conclusive. In other cases namely those in which the other party has been induced to alter his position upon the faith of the statement contained in the document, such a statement will operate as an estoppel. In this view of the matter, an estoppel arising from a deed or other instrument is only a particular application of that estoppel by conduct or misrepresentation under Section 115.

4. An estoppel does not arise under the Evidence Act merely because a statement is contained in a deed. It can work an estoppel only when it can fall with section 115.

I All. 403.

II Bom. 708.

5. A Recital in a deed may be merely an admission or it may be estoppel according to circumstances.

§ Particular Estoppels.

1. Section 115 deals with Estoppels in general, sections 116 and 117 deal with particular Estoppels.

2. The distinction between Estoppels under Section 115 and Estoppels under 116-117 may be noted.

(i) Estoppels under section 115 can arise between any two parties. It is not necessary that they should be related by a particular legal tie. Estoppels under 116-117 arise **only** between parties who are related by a particular relationship.

(ii) Estoppel under 115 arises by reason of **misrepresentation of facts** by one party to another. Estoppel under 116, 117 arise by reason of agreement between the parties which has forged a particular relationship between them.

Section 116. deals with Estoppels between

(i) Landlord and Tenant and

(ii) Licensee and Licensor of immoveable property.

I. Landlord and Tenant.

This Estoppel applies to the tenant of immoveable property.

2. This estoppel applies also to a person claiming through the tenant. In other words, if a tenant sublets his property without the knowledge or permission of the landlord, the sub-tenant will also be estopped from denying that the landlord had the title in the beginning,

3. This Estoppel does not ensure to the benefit of a person claiming through the landlord.

There are two possible cases in which premises may be let:

(i) Where the Plaintiff has let the Defendant into possession of the land.

(ii) When Plaintiff is not himself the person who lets the Defendant into possession, but claims under a title derived from the person who did.

This section applies to the first case and estops the tenant from denying the Landlord's title. It does not apply in the second case where the title of the landlord is derivative i.e. by sale, lease or inheritance so that when the Plaintiff claims by a derivative title, the defendant is not estopped from showing that the title is not in the Plaintiff but in some other person. The tenant can show that he has no derivative title. This is the effect of the absence of the words "claiming through the landlord".

This estoppel applies to a denial of title **at the beginning of the tenancy,** so that a tenant can show that his landlord's title has expired or is determined. In such a case he does not dispute the title, but confesses and avoids it by a matter *ex-post facto*. Justice requires that the tenant should be permitted to raise this plea, for, a tenant is liable to the person who has the real title and may be faced to make payment to him, and it would be unjust if, being so liable, he could not show the expiry or determination of his landlord's title as a defence.

4. **The Scope of the Estoppel.** A tenant or his representative will not be permitted to deny that on the day on which his tenancy commenced, the landlord who granted the tenancy had title to the property.

5. **This Estoppel binds the tenant only so long as the tenancy continues.** Once the tenancy has ceased he is free to deny that his landlord had any title even on the day on which tenancy commenced.

II. Licensee and Licensor of immovable property.

1. The rule is the same as a licensee, namely, that the licensor had title to such possession at the time when such license was given.

2. Difference between a **tenant** and a **licensee.**

License means permission given by one man to another to do some act, which without such permission it would be unlawful for him to do. It is a personal right, and is not transferable, but dies with the man to whom it is given. It can as a rule be revoked by the Licensor unless the licensee has paid money for it.

Tenancy is an interest in land and is transferable and heritable.

Section 117 deals with (1) Estoppel of acceptor of a Bill of Exchange.
(2) Estoppel of a Bailee.
(3) Estoppel of a Licensee.

(1) The Estoppel with regard the Acceptor is to the effect that he should not be permitted to deny that the drawer had an authority to draw the Bill or to endorse it.

Reason for this rule is to be found in the Agreement between the Acceptor and the holder of the Bill.

What does the agreement of acceptance impost:

(1) That he will pay the payee or the holder.

(2) That if he fails to pay the drawer will pay.

What does it mean when he says that the Drawer will pay ? It means that the drawer had the authority and capacity to bind himself.

The payee took it on the basis of this agreement. The acceptor, therefore, is not permitted to deny this agreement.

Under Explanation I, he is permitted to deny that the signature of the drawer is a forgery.

This is contrary to English Law.

(2) & (3) **Estoppel in respect of a Bailee and Licensee.**

They cannot deny the authority of the bailor to make the bailment or of the licensor to grant such a license at the time when such bailment or license commenced.

§ Matters stated without prejudice.

1. Under this head fall certain classes of admissions made by a party.

2. If the admission is made under certain circumstances mentioned in Section 23, it cannot be proved against the party who made it.

3. What are those circumstances ?

(1) If it is made on condition that evidence of it is not to be given

(a) Condition may be express or

(b) Condition may be implied from the Conduct of the parties.

(2) Agreement may be verbal or in writing.

4. **The application of Section 23.**

(1) It applies to **Civil cases** only. The rule does not extend to criminal cases.

(2) By Judicial interpretation the application of the Section has been confined to admissions made in the course of the negotiations in the same.

The mere fact that a document is stated to have been written "Without Prejudice" will not exclude it. The rule which excludes documents marked "Without Prejudice" has no application unless some person is in dispute or negotiations with another and terms are offered for the settlement of the dispute or negotiation. *23 Bom. 177 (180).*

Explanation—

This section does not apply where a person is compellable to answer.

§ Matters which are irrelevant.

1. The law of Evidence does not state what matters are irrelevant.

2. It proceeds to state what matters are relevant and thus excludes those that are not relevant.

3. It is objected that the rules of relevancy are of no use.

4. There are two problems a Judge is faced with

(i) Whether and how far he ought to believe what the witness says ?

(ii) What inference a Judge ought to draw from the facts which he believes to have been proved ?

In every judicial proceedings there are two essential questions—Is this true ? and if it is true, what then ?

5. Rules of relevancy throw no light on either of them and persons who are absolutely ignorant of these rules may give a better answer.

6. Answer to the objections.

(i) Men reason and reason well even without the study of Logic. But it does not follow that we should study Logic.

(ii) The rules of relevancy out the flood of irrelevant gossip and collateral questions which are sufficient to comprise the strongest head and distract the most attentive mind.

I. Cardinal rule of relevancy is that you can prove a fact and not opinion.

Facts fall into two classes:

Those can and those which cannot be perceived by the senses. Those which cannot be perceived by the senses are :

(1) Intention, (2) Fraud (3) Good faith and (4) Knowledge.

§ Matter of which Proof is allowed by Law.

1. Facts in Issue. 3, 5, 12.

2. Facts relevent to Facts in Issue. 3, 6, 7, 8, 9, 13-16, 52-58 45-51.

3. Facts which are consistent with facts in Issue or with Relevant Facts or which show the probability of a Fact in Issue and Relevant Fact. 34-39-46.

Note—31-32 will go under direct evidence as exceptions.

4. Facts which are inconsistent with 11(1).
Facts in Issue or with Relevant Facts. 17-31.
or which show the improbability of a Fact
in Issue or Relevant Fact. 41 -44,46.

§ Facts in Issue.

Section 3. There are two Requisites of a fact in issue :

(1) **It is a necessary fact.**

A Fact in Issue is a fact which is the foundation of right claimed or of the liability which is sought to be imposed by one party against or upon another party.

A fact in issue is a fact the proof of which is necessary for the claim being granted or the liability being imposed.

Illus—

(1) Supposing the inquiry to be **whether A is entitled to succeed to B's property as his son.**

The following facts would be necessary facts :

(a) Whether A is the son of B.

(b) Whether B is dead.

(c) Whether the property belongs to B.

They are necessary facts because unless they are proved A's claim to succeed cannot be granted. They are the foundation of his claim.

Illus—

(2) Supposing the inquiry is

Whether A caused the death of B.

The following facts would be necessary facts :

(i) Whether A caused the death of B.

(ii) Whether A had the intention to cause death.

2. Every necessary fact is not a fact in issue. A necessary fact whether it is asserted and denied becomes a fact in issue.

In Illus. 1 and 2 if any necessary fact is not denied it would base to be a fact in issue.

3. A fact in issue is, therefore, a necessary fact which is in dispute between the two parties.

2. **§ Facts which are relevant to Facts in Issue.**

Section 3. I. Relevant fact means fact connected to the fact in issue.

1. The connection must be **visible** and **open** i. e. must be **obvious.**

2. The connection must be **immediate and not remote.**

3. The connection need not be **necessary** connection that would exclude all **presumptive** evidence, but such as **is reasonable,** and not **latent** or **conjectural.**

4. Whether there is a connection is a matter of legal instinct or legal sense to be acquired by practice. A few instances may serve for illustrations.

(a) On a Criminal trial of A, the statement of B, who is not a witness that he was the real criminal and that A is innocent would be rejected for remoteness and **want of connection** apart from the danger of collusion and fabrication.

R vs. *Gray Ir. Cir. Rep. 76.*

(b) On a suit by A against B for the recovery of £ 5 lent to him, an entry made by A in his diary that B owed him £ 5 would be rejected for want of connection.

Storr vs. *Scott. 6* c & P *241.*

(c) A as Agent of B, a Merchant residing abroad bought goods of C. At the time of purchase A did not inform C who was his principal; but the invoices described the goods as "bought on account of B per A". C afterwards drew upon A for the amount. B after receiving advice for the purchase and of the acceptance of bills by A had made large remittances to A. But A had become insolvent in the meantime.

C sued B the principal.

C desired to give evidence of his account books for the purpose of showing that B had been throughout debited by him as principal.

Held that evidence was inadmissible.

Smyth vs. Anderson. 7 C-b. *21.*

II. It is not every connected fact which is relevant. It is only facts connected **in a particular** respect which are relevant. The Evidence Act lays down in what way a particular fact must be connected with the fact in issue in order that it may be treated as a relevant fact.

6. **1. § Proof is allowed of Facts forming part of the same transaction comprised in the facts in issue.**

Take Illus (a), (c) (d).

What is meant by transaction ?

A transaction is a group of facts so connected that they go by a single name such as a **crime, contract, sale** etc.,

Anything connected with the crime or contract if the connection is open and visible i.e. **obvious** and **immediate** is part of the same transaction and is relevant.

What does transaction include ?

A transaction not only includes acts done but also statement made in the course of the transaction.

Illus—

The cries of a woman when raped. The statement to be part of the same transaction must accompany the act.

What is meant by same transaction ?

1. Same does not mean similar. Evidence of series of similar transactions irrelevant.

2. Same transaction does not mean transaction which has taken place at the **same** time and **same** place. It has nothing to do with simultaneity of occurrence as to time and place.

Illus.—

Robbery may take place in January in one place, stolen goods may be entrusted with a receiver in another place in February and may be sold in March in a third place. All this would be parts of the same transaction.

3. Same transaction means **one connected transaction—parts of the same piece.**

Case Law. Cockles pp. 66-68.

53 Cal. 372.

Principle. Such evidence is allowed because it makes things intelligible. It provides context.

2. § Proof is allowed of a Fact which shows **occasion, cause, effect** or **opportunity** for a fact in issue or for a relevant fact.

1. A man is accused of **theft.** If no money is found in his possession, probability is that he did not commit theft. Every cause has effect If there was no effect no cause.

2. A man is accused of assault.—That there was a quarrel may be proved to show that there was occasion or cause.

3. A man is accused of poisoning his wife.—To show there was no opportunity for him to do so, it can be proved that the nurse was always present.

4. A is accused for murdering B.—To show there was **cause** for murder can be proved that B knew that A had married to C and that wanted hushmoney from A.

8. 3 § Proof is allowed of facts which show **Motive, Preparation** for any fact in issue or relevant fact.

Motive. Illus. (a) (b). No rational man acts without motive.

Preparation. Illus. (c) (d). No act can be done without preparation.

Case Law.

1. *61 Cal. 54*—Motive-intention-Preparation-attempt-Act.

2. *R* vs. *Palmer*—Cockle P Killed Cook.
Pecuniary embarrassment, his buying poison, attempting to avoid inquest.

3. *R* vs. *Lillyman* Cockle P. (1896) 2Q B 167.

4. § Proof is allowed of a fact which shows the conduct of a party to any suit which has reference to such suit or which has reference to any fact in issue or to any relevant fact. Similarly proof is allowed of a fact which shows the conduct of an accused if such conduct influences and is influenced by any fact in issue or by any relevant fact.

1. Conduct of persons generally.

Illus.— (d) The making of a will. Not long before the making of the will, the deceased made inquiries and drafts relevant.

Conduct of the Accused:

Illus.— (e) suborning witnesses.

Illus.— (h) absconding.

Illus.—(h) concealing things.

Explanation—

1. Conduct does not include statement unless the statement accompanies the conduct and explains the conduct.

2. If conduct is relevant then

a statement which **affects** the conduct is relevant if it was made to the person or in his presence and hearing.

Illus.—

(g) Question is whether A owed B Rs. 10, 000. The A asked C to lend his money and D said in A's presence and hearing "I advise you not to trust A, for he owes Rs. 10,000" and A went away without making any answer is **relevant.**

Case Law.

Imp. 34 om. & R. 1087.

Imp. 7 All. 385 F.E.

Cockles-P. 75. Bright vs. foe B Tatham.

5. § Proof is allowed of facts which are necessary to explain or introduce a fact in issue or a relevant fact.

Illustration—

(d) On an indictment for crime it was alleged that the Accused was absconding.

Evidence may be given to show that he had urgent business.

(f) A is tried for a riot to assault or overowe the Police Officer and is proved to have marched at the head of a mob. Evidence may be given of the cries of the mob to explain the nature of the transaction.

(b) On suit for libel—imputing disgraceful conduct. Evidence may be given of the position and relation of Parties at the time the libel was published as introductory to facts in issue.

Under this evidence may be given of:

(1) The **identy** of a person or thing whose identity is in question.

(2) Exact time and place at which a fact in issue or a relevant fact happened.

(3) of the relation of the parties, to the fact in issue or relevant fact.

4. § Proof is allowed of facts showing the existence of any state of mind.

1. **Under this,** facts may be proved which shows intention, knowledge, good faith, negligence, ill-will or good will.

knowledge, Illus. (a): **good faith** Illus. (f): **Intention,** Illus. (e) (j): **Ill-will.** Illus. (k).

2. Under this, evidence of previous conviction may be given. Illus. (b).

3. **Limitations** upon the use of the Section.

(1) The state of mind of which evidence is given is not **general state of mind-** general disposition -but a state of mind which has reference to the particular matter in question.

(2) The evidence of the previous commission of the offence must be to show his state of mind with regard to the particular matter in question and for no other purpose.

15. § Proof is allowed of facts to show that the act done was a part of a series of **similar** acts in order to show that the act in question was done **intentionally** and not **accidently.**

Illustration— (a) (b)

1. Ordinarily the evidence of similar acts is not relevant because if a person has done one act, it does not follow that he must have done the particular act in question.

16. § Proof is allowed of facts showing the existence of a course of business according to which it naturally would have been one, if the question is a particular act was done or not.

Illus.—(a) (b).

This shows probability.

Question is whether a particular letter reached A or not ? The letter was posted and was not returned through the Dead Letter Office may be proved.

13. § EVIDENCE OF TRANSACTION AND INSTANCES IN PROOF OF RIGHTS AND CUSTOMS.

1. **Scope of the word Right.**

(A) There are three kinds of rights.

Private—e.g. a private right of way.

General—A Right common to any considerable class of persons. E.G. the right of villagers of a particular village to use the water of a particular well. Sec. 48 Illus.

Public—This is not defined in the Act. Every public right in the sense of the previous definition of general right is a general one though (according to the distinction drawn by the English Law) every general right is not a public right.

The section applies to all rights whether they are Private, General, or Public by reason of the word **any.**

(B) Does the section apply to **all** kinds of rights ? This question arises because of the absence of the word **every.** There was once a conflict of decisions on this question. One view was that included **all** rights. The other view was that it included only **incorporeal** rights.

The view now held seems to be that the term includes all rights.

2. Scope of the word custom.

A custom is not limited to ancient custom but includes customs and usages. Usage would include what people are now or recently in habit of doing in a particular place. It may be that the particular habit is of a very recent origin or it may be existed for a very long time. If it is one which is ordinarily practised there is usage.

B. Custom may be

(i) Private custom—Family custom,

(ii) General Custom-—Custom common to a considerable class of people and may be

(a) local

(b) caste or class

(c) Trade customs or usages.

(iii) Public—Not defined.

C. The Section applies to all customs and to all usages.

3. The evidence to be given is to be evidence of a **transaction** or of **instances** in which the right or custom arose.

A. Meaning of **transaction** and **instance**

(1) Transaction—some business or dealing carried on between two or more persons.

(2) Instance—Case occuring—individual acting in a particular way.

B. Proof is not restricted to previous transactions in cases between the parties to the proceedings. The use of the word **any** shows that it need not be between the parties to the litigation. It may be between strangers or it may be between a party to the litigation and a stranger.

C. The word transaction and instance has given a deal of trouble and the question has been raised whether it includes a judgement decree and the litigation in which they were pronounced not being between the same parties (and not being of a public nature), as evidence of a transaction or instance.

The question was considered in the leading case *Gajju Lull* vs. *Fatteh Lal.* **6 Cal. 171.**

III. Facts which are consistent with facts in issue or with relevant facts or which makes a fact in issue or of a relevant fact **highly** probable.

1. The Section is no doubt expressed in terms so wide and so extensive that any fact which can by a chain of ratiocination be brought into connection with another so as to have a bearing upon a fact in issue or a relevant issue may possibly be held to be admissible.

2. That such an extensive meaning was not intended by the legislature is clear from the word 'highly'. The words 'highly probable' point out that the connection between the facts in issue and the fact sought to be proved must be so **mediate** as to render the co-existence of the highly probable.—*6 Cal. 665 (662).*

3. To render a collateral fact admissible under this section, it must (a) be established by reasonably conclusive evidence and (b) when established afford a reasonable presumption or inference as to the matter in dispute.—6 *Bom. L. R. 983.*

4. The terms of this section though very wide must be read subject to other sections of the Act.

Illus—

1. *Ramanujan* vs. *King Emperor.*

58 Mad. 523 F. B.

Ramanujan was charged for having murdered Seethammal. Facts given at p. 526.

There was no eye-witness to the murder. The prosecution tendered evidence of the following facts :

1. That Seethammal when she left her husband joined the prisoner taking with her some jewels and some silver vessels.

2. That Seethammal and the accused lived together at various addresses.

3. They were last seen in 24 Peddunaicken Street on the 11th January.

4. On the morning of the 12th, when the milk woman went, the room was locked.

5. That on or about the 13th he pledged certain ornaments belonged to Seethammal.

6. That he purchased a mattress like the one in which the dead body was wrapped.

2. Long continued absence of demand to prove the payment of an alleged debt.

3. The resemblance of a child to the Defendant to prove paternity in a maintenance case.

11 (2) § Facts which are inconsistent with facts in issue or relevant facts or which make them highly improbable.

Illustrations.

1. In an action for money lent, the poverty of the alleged lender is relevant as being inconsistent with the making of the loan.

2. That a witness or the accused was at another place is relevant as inconsistent with his alleged presence at the scene of the offence.

3. In a case involving the determination of the question whether the thumb impression is that of A or not. Evidence may be given of his thumb impression on another document if their dissimilarity makes the story of his thumb impression improbable.

52-55. § **Proof of facts relating to character.**

1. The rules regarding evidence of character fall into two classes.

I Those which relate to the character of witnesses.

II Those which relate to the character of parties.

Character of witnesses.

1. The character of a witness is always material as affecting his credit. The credibility of a witness is always in issue. For as witnesses are the media through which the Court is to come to its conclusion on the matters submitted to it, it is always most material and important to ascertain whether such media are trustworthy and as a test of this, questions, among others, touching character are allowed to be put to witnesses in the case—Sections 145-153.

§ **Character of a Party.**

1. In respect of the character of a party, distinctions must be drawn between

Cases where the character of the party is in issue

and

Cases where it is not in issue.

Where the character of the party is in issue, there, proof of facts relating to character is allowed irrespective of the question whether the proceedings are civil or criminal. Sec. 52.

Illus.—

(i) In a Civil Suit the issue is "whether the governess was competent, ladylike and good tempered while in her employer's service" witnesses can be allowed to assert or to deny her general competency, good manners and temper.

(ii) In a Criminal prosecution for conspiracy to carry on the business of common cheats witnesses can be allowed to assert or to deny the general character of the accused.

When such general character of a party is not in issue, proof of character is not permitted by Law. *Sec. 52.*

There are two exceptions to this rule under which evidence of character is allowed even the character is not in issue.

(i) In Civil proceedings, proof of facts relating to character is allowed if they affect amount of damages. *Sec. 55.*

(ii) In Criminal Cases.

(i) Proof of facts showing accused is of good character is always allowed. Sec. 53.

(ii) Proof of facts showing accused is of bad character is not allowed except in the following case :

Where accused has given evidence that he has a good character.

Reasons why this difference is made between civil and criminal proceedings is obvious.

(1) Bad character only creates prejudice against the accussed. It does not prove the case against the accused. It is irrelevant unless the accused makes it a matter of issue by giving evidence of his good character, then of course evidence of bad character may be given.

(2) Good character strengthens the innocence of the accused and ought on humanitarian grounds to be permitted.

Two things are to be noted.

1. What is included in the term character ?

Sec. 55.

The word Character includes both **reputation** and **disposition.** This is a departure from English law under which character is confined to reputation only.

There is a distinction between reputation and disposition. **Reputation** means what is thought of a person by others, and is constituted by public opinion. It is the general credit which a man has obtained in that opinion.

Disposition comprehends the springs and motives of action, is permanent and settled and has regard to the whole frame and texture of the mind.

2. How to prove Character ?

There are two ways of proving the character of a man. One way is to give evidence of general reputation and general disposition. The other way is to give evidence of particular acts which may then become the basis of inference for reputation and disposition.

55 Expl.

The Evidence Act permits evidence to be given **only** of **general** reputation and **general** disposition.

55 Expl.

There is only one exception to this under which evidence of previous conviction may be given as evidence of bad character.

Sec. 45-51.

§ Proof of opinions.

1. The use of witnesses is to **inform** the Court of the facts of the case. It is the duty of the Court to form its own opinion.

2. To show what the witness **thought** or **believed** would be objectionable on two grounds (I) It can show nothing at all and (2) it would be entrenching upon the province of the Judge.

3. The rule is that witness must state facts and not opinions. A strict application would create two difficulties.

(1) What a **third person** (i.e., some one who is neither a plaintiff, a defendant nor a prisoner) thinks or believes about any matter in question is not material. If such a third person be called as a witness, he must, as a rule, only state facts; his personal opinion is not evidence. But what a party thinks or believes at the time he does a material act is often a matter in issue both in Criminal and Civil proceedings.

Illus.—Carter -vs. - *Boehin. Cockle p.*

Question was whether a policy of insurance was vitiated by the concealment of facts which had not been communicated to the under writers. A broker gave evidence of the materiality of the facts. He was asked whether he would have entered into the contract if these facts were disclosed. His answer that he would not have was held to be inadmissible as it was matter of opinion. But if the question had been asked to the party then his opinion would have been admissible.

(2) A strict application of the rule is bound to create difficulties. In cases where the Court is required to form an opinion, the Court may not be competent to form an opinion cases occur in which special experience or special training is necessary before a true opinion can be formed. In such cases therefore the opinion of those who have had special experience or special training must be laid before the tribunal to enable it to arrive at a correct decision.

(3) There are certain cases where it is naturally impossible for any witness to speak positively, cases where he must speak if at all, as to his opinion or belief, the matters to which he deposes being so essentially matters of opinion or else to complex or indefinite that the Court is compelled to accept his opinion for what it is worth. The former are cases involving questions of science, art, or skill which necessarily require the opinion of the expert. The latter class of cases are cases involving question of impressions which may be those of non-experts.

(5) The Evidence Act therefore makes the following exceptions to the general rule that the opinion of a witness is not admissible.

Sec. 45.

(1) The opinions of **skilled** or **scientific witnesses** (Experts) are admissible evidence to elucidate matters which are strictly of a **professional** or **scientific** character.

For instance.

(i) Question of foreign law.

(ii) Question of Science or Art (working of a gun machine).

(iii) Question of as to identity of handwriting or finger impression.

Sec. 47.

(2) On questions of identification of a person by whom any document was written or signed, the opinion of the person acquainted with the handwriting of the person is relevant.

Sec. 48.

(3) Where the Court has to form an opinion as to the existence of any **general custom or right,** the opinion of persons **likely** to know of its existence is relevant.

Sec. 49.

(4) When the Court has to form an opinion as to :

1. The usages and tenets of anybody of men or family.

2. The constitution and government of any religions or charitable foundation.

3. The meaning of words or terms used in particular districts or particular classes of people.

The opinions of persons having special means of knowledge thereon are relevant facts.

Sec. 50.

(5) When the Court has to form an opinion as to the relationship between two persons, the opinion of persons based on the conduct of parties and having special means of knowledge on the subject.

Illus—(a) (b)

Proviso. Such opinion shall not be sufficient to prove marriage under Indian Divorce Act or the prosecutions under sections 494, 495, 497, 498 of the I. P. C.

Nature of Evidence Required for Proof

Summary of the Law

I. The Rule of Best Evidence.

II. Requirements of the Rule of Best Evidence.

(i) The rule of Best Evidence requires.

(a) That if the Evidence is oral then it must be direct.

(b) Exceptions.

(ii) The rule of Best Evidence requires that if the Evidence is documentary then.

(i) It must be original,

(a) Exceptions,

(ii) it be exclusive,

(a) Exceptions.

§ The Rule of Best Evidence :

1. It is an incontrovertible proposition of law that the party who is to prove any fact must do it by the **best** evidence of which the nature of the case is capable.

2. This rule, really speaking, underlies the whole law of Evidence.

(i) It is because of this rule that the law requires as a condition precedent to the admissibility of Evidence that there should be an open and visible connection between the principal and evidentiary facts.

(ii) It is because of this rule that the law requires that Evidence in order to be receivable should come through proper instruments.

(iii) It is because of this rule that the law requires that the evidence to be admissible should be original and not derivative.

3. At one time the rule of Best Evidence was very strictly applied. But its application is now greatly relaxed and what were once objections to admissibility now went merely to sufficiency on weight.

4. But the rule still survives and is illustrated by the requirements of the law of evidence in respect of oral Evidence and documentary evidence.

§ Oral Evidence :

1. The rule of best Evidence requires that if the evidence is oral then it must be direct.

2. This rule is embodied in section 60 of the Evidence Act.

3. What is meant by Direct Evidence ?

4. The answer that is commonly given is that oral evidence must not be hearsay evidence. This leads to the consideration of hearsay evidence.

The rule excluding Hearsay is subject to three main classes of Exceptions:

(i) Admissions and Confessions: Statements made in the presence of the party.

(ii) Statements made by persons since deceased,

(iii) Statements made in public Documents.

§ What is hearsay evidence:

1. Hearsay evidence has been defined in many different ways :

(i) All Evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person.

(ii) The statement as to the existence or non-existence of a fact which is being enquired into, made otherwise than by a witness whilst under examination in Court can be used as evidence.

2. Hearsay evidence is evidence reported by witnesses of statements made by non-witnesses.

§ Why hearsay evidence is excluded ?

1. When A sworn in Court, details something which he did not see with his own eyes **immediately** but which he **heard** from B **mediately** he is not giving expression to the evidence of his own bodily senses, but is the **medium** merely of communicating that which save third unsworn person has said he saw. He is bringing evidence to birth, *obstetricante manu,* with the hand of a midwife; and is a mere channel or conduct pipe for communicating the information of a party not before the Court. A may most correctly and truthfully

report what has been related to him, but it is never the less apparent that the real truth of the original statement cannot under such circumstances be tested. The originator of the report is not subjected to an oath or to Cross Examination *Non Constat* but he may have spoken idly or jocularly ; and he would be unwilling to repeat on oath what he had not hesitated to narrate in ordinary conversation. *Non constat* that he might not have wilfully fabricated a story or been the dupe of some one still farther hid behind the scences or that though perfectly veracious as to intention, he might have been the victim of his faulty impressions or unreten-tative memory ; and so have utterly broken down, if only exposed to the test of Cross Examination. Therefore the law determines that such evidence shall not be receivable; that if it is important to the party calling A, to establish the facts which A has heard from B, B himself shall be produced, make his own statement in Court, be subjected to the two tests of oath and Cross Examination and the scarcely less terrible detector of inaccurate or fallacious evidence, the observation to which a Judge, experienced in forensix practice, and skilled in the knowledge of human nature, subjects the demeanour, the department, the manner, of every witness who comes before him.

§ **Does the rule of Exclusion apply to all Hearsay Evidence ?**

1. Hearsay is the statement of a person who is not a witness in the Court and which is sought to be tendered as evidence through another person who comes as a witness.

2. The question is, does the rule of exclusion apply to all statements of a person who is not a witness in Court.

3. To understand this question it is necessary to realise that a statement when tendered in evidence wears two different aspects. **A statement is a fact and it is also the statement of a fact.**

Illus—

When A gives Evidence that B said this or that

(i) taken as a fact the question is **did say so or did he Not**

(ii) taken as a statement of a fact the question is Is what said false or true.

4. The Evidence of a statement by a person who is not a witness may be given for two purposes :

(i) To prove that such a statement was made.

(ii) To prove that a statement made is a true statement.

In its former aspect it is merely a fact in issue. In its latter aspect it is an assertion to prove the truth of the matter stated.

5. Whether a statement by a non-witness sought to be tendered in evidence and the admissibility is in question is tendered merely as a fact in issue or relevant fact and is tendered as an assertion to prove the truth of the matter, depends upon the purpose for which it is tendered. The test is the purpose.

6. The Rule of Exclusion of hearsay is stated in a narrow sense as well as in a wider sense. In its narrower sense, it is confined to unsworn statements used to prove the truth of the facts stated. In its wider sense, it is used to include all statements by unsworn witnesses for whatever purposes tendered i.e. including statements used merely as facts.

The Rule adopted in the Evidence Act.

1. The Indian Evidence Act does not recognise the rule that "no statement as to the existence or non-existence of a fact which is being enquired into, made otherwise than by a witness whilst under examination in Court can be used as evidence" — Markby.

2. Under the Indian Evidence Act statements by non-witnesses are admissible where the making of the statements not its accuracy is the material point.

3. Therefore

(i) Statements which are parts of the **res gestee**, whether as actually constituting a fact in issue or accompanying it (ss 5, 8),

(ii) Statements amounting to acts of ownership, as leases, licenses and grants (Sec. 13),

(iii) Statements which corroborate or contradict the testimony of witness (ss. 155, 157, 158)

are admissible even though they are statements by non-witness.

4. The rule of the exclusion of hearsay applies only to statements made by non-witnesses which are used to prove the truth of the facts stated.

4. What are the exceptions to the rule ?

1. Under the rule of evidence contained in the Evidence Act a statement made by a non-witness to prove the truth of the facts stated therein is inadmissible.

2. There are exceptions to this rule.

§ Exceptions contained in Section 32.

1. When a person is dead or cannot be found or has become incapable of giving evidence or whose attendance cannot be procured without delay or expense, statements written or verbal made by such persons may be proved if the statements fall under any one of the 8 categories mentioned in Section 32.

(i) When it relates to the cause of his death (a)

(ii) When it is made in the course of business. *Illus* (b) (j)

(iii) When it is against the pecuniary or proprietory interest of the maker or which if true would have exposed him to criminal prosecution or suit for damages. *Illus* (e) (f)

(iv) When the statement gives his opinion as to public right or custom or matters of general interest provided such opinion was given before controversy had arisen.*(Illus)* (i)

(v) When it relates to the existence of relationship by blood, marriage or adoption and the person had special knowledge and was made before controversy.

(vi) When it relates to the existence of relationship between persons deceased and is made in any will or deed relating to family affairs, in a family pedigree, upon any tombstone, family portrait etc., and is made before controversy.

(vii) When it is contained in any deed, will or other document which relates to any transactions as is mentioned in Sec. 13, clause (a).

(viii) When it is made by a number of persons expressing feelings or impressions. Illus. V.

§ Exceptions contained in Section 33.

1. When a person is dead, or cannot be found, or is incapable of giving evidence or is kept out of the way by the adverse party or if his presence cannot be obtained without unreasonable delay on expense then

the Evidence given by such a person as a witness in a former judicial proceeding or before any person authorised by law to take it,

can be tendered in a subsequent judicial proceedings or in a later stage of the same judicial proceedings to prove the truth of the facts which it states.

PROVIDED

(i) That the proceeding was between the same parties or their representative in interest

(ii) That the adverse party in the first proceeding had the right and opportunity to cross examine

(iii) That the questions in issue were substantially the same in the first as in the second proceeding, (Further portion not forthcoming—ed.)

35 § Entries in any book, register or record

1. Conditions of admissibility.

(i) Two classes of entries are contemplated by the section, (a) By public servants and (b) by persons other than public servants. If it is by a public servant then it must be in the discharge of his official duty. If it is by persons who are not public servants then the duty to make the entry must have been specially enjoined by the law. The former is as a matter of course. The latter is as a matter of special direction.

(ii) The book, register or record must be either **public** or an **official** one.

Official does not mean maintained for the use of the office. It means maintained by the State as distinguished from anything maintained by a private individual.

Public means for the use of the public. Public does not mean open to every one. It means open to every one having a concern to it. *18 Cal. 584.*

(iii) The Book, Register or Record may be in the book, register or record kept in any country not necessarily in India, provided it satisfied the conditions. An entry in a book, register or record of any foreign country can be proved.

Points to be noted.

(1) The entry is evidence ; though the person who made it is alive and is not called as a witness—For the proof of public and official documents see Sections 76-78.

(2) The Sections does not make the book, register or record evidence to show that a particular entry has not been made—

10 Cal. 1024 ; 25 All. 90.

(3) The Section is not confined to the class of cases where the public officer has to enter in a register or other book some actual fact which is known to him—

20 Cal. 940.

(4) Although the entry must have been made by a public servant in the discharge of his official duty or in the performance of a duty specially enjoined by law, but it must not be such an entry which a public servant is not expected or permitted to make, or which from ignorance of his duties or caprice or otherwise, he may choose to make at the dictation of a person who had a personal knowledge of the truth of the facts stated in the entry.

25 All. 90.F. B. 101.

2. It is not necessary that the entries must have been made up from day or (as in banks) from hour to hour as the transactions take place. Time when the entries are made is not essential. All that is necessary is that they must have been made regularly in the course of business. Delay in entry may affect its value but cannot affect its admissibility—27 Cal. 118 (P C.); 13 C. I J. 139.

3. Although the actual entries in books of account regularly kept in the course of business are relevant, the book itself is not

relevant to disprove an alleged transaction by the absense of any entry concerning it.

10 Cal. 1024.

NOTE : It may be admissible under Sec. 9 and 11—19 C. N. 1024.

For inference to be drawn from absence of entry.

30 Cal. 231 (247) P. C.

4. The entry must be in some book, register or record. Entry does not include correspondence 7 *M.L.I.117.*

Illus.—

1. Entries in Birth and Death Registers.

2. Entries in Birth and Revenue Registers.

3. Entries in Birth and Marriage Registers.

36 § Statements of fact in issue or relevant facts made in Maps, Plans and Charts.

I. Conditions of admissibility.

The section refers to two classes of **Maps** and **Plans.**

(a) Those generally offered for **public sale** and

(b) Maps or Plans made under the authority of Government.

Reasons for the admissibility of (a)

The publication being accessible to the whole community and open to the criticism of all the probabilities are in favour of any inaccuracies being challenged or exposed.

Reasons for the admissibility of (b)

Being made and published under the authority of Government, they must be taken to have been made by and to be the result of the study or inquiries of competent persons.

37 § Statement made in a recital in any Act or in a notification of the Government appearing in the Gazette.

Reasons.

1. The Gazettes and Acts are admissible because they are made by the authorised agents of the public in the course of an official duty and published under the authority of the State and facts stated in them are of a public nature and notoriety.

2. As the facts stated in them are of a public nature, it would often be difficult to prove them by means of sworn witnesses.

1. Relevant only if the Court has to form an opinion as the existence of any fact of a public nature.

2. Public nature. (not explained—ed.)

3. The section drawns no distinction between a public and private Act of Parliament. It merely requires that the fact recited in either case should be a public nature.

4. The recitals are not conclusive so far as the Evidence Act is concerned. However they may be expressly declared to be conclusive.

5. A recital is to be proved for showing the existence of a fact. It is no evidence that the particular person knows its existence. Knowledge of a fact although it be of a public nature is not to be conclusively inferred from a notification in the Gazette; it is a question of fact for the determination of the Court. It must be shown that the party affected by notice has probably read it.

38 S.

1. Statement of the law of any country in

(a) book purporting to be printed or published under the authority of the Government of such country and to contain any such law.

2. Report of a ruling of the Court of such country contained in a book supporting to be a report of such rulings.

This applies where the Court has to form an opinion as to a law of any country.

Particular instances of facts which are inconsistent with facts in issue or relevant facts or which make them highly improbable.

They are (1) Admissions (2) Confessions and (3) Judgements.

§ Admissions

Sec. 21.

1. Admission may be proved against the person who makes them or against his representative in interest.

2. Question is what is an admission? Before that certain points regarding the relevancy of admissions must be noted.

(1) Admission can be proved against a person. Admission in favour of a person cannot be proved by him. A plaintiff can prove an admission made by the Defendant if it is necessary for this case. A defendant can prove an admission made by the plaintiff if it is necessary for his case. But a plaintiff cannot prove an admission made by him however helpful it may be for his own case. Similarly a Defendant cannot give evidence of an admission made by him however hopeful it may be for his own case.

The reason is that a party cannot be allowed to create evidence in his own favour.

There are three exceptions to this rule under which a party is permitted to give evidence of an admission in his own favour.

(a) If the Admission is relevant under Sec. 32.

(b) IF the Admission relates to a state of mind or body made about the time and is accompanied by conduct.

(c) If the admission is relevant otherwise than as an admission.

Illus: (d) and (e)

Sec. 23.

(2) Barring these three cases, an admission, if it is to be proved can be proved only against a party. But there is a casein which proof of an admission cannot be given. This is a case where admission was made on the express condition that proof of the admission shall not be given.

Sec. 31.

(3) Admissions are not conclusive proof of the matter admitted. An admission may become an estoppel if the elements necessary for estoppel exist in which case a party against whom it is sought to be proved cannot give evidence to disprove it or explain it away. But if it is not an estoppel, evidence can be given by the party against whom it is proved to disprove it or to explain it.

3. Admissions can only be proved against the party who made them but they can also be proved against his representative-in-interest.

Who is a representative-in-interest ?

(i) There is no definition of the term given in the Act.

(ii) It is held to be wider than the term Legal representative which according to the penal code means a person who represents in law the estate of a deceased person.

(iii) It not only includes a 'legal representative' but also includes the **privies of a person.**

(iv) The privies of a person are :—

(i) *Privies in blood,* such as ancestors and heirs.

(ii) *Privies in law,* such as executor of a testator or administrator to an intestate.

(iii) *Privies in estate* or interest, such as Vendor and Purchaser, grantor and grantee, donor and donee, lessor or lessee.

So that an admission :

(1) made by the father can be proved against the son ;

(2) made by the deceased against the executor or administrator ;

(3) made by the Vendor against the Purchaser.

17-20 § What is an Admission.

1. Admissions are (1) Formal or (2) Informal.

(1) Formal admissions are :

(i) Admissions contained in the pleadings.

(ii) Admissions in answers to interrogatories.

(iii) Admissions on notice to admit facts.

(iv) Admissions on notice to admit documents.

(v) Admissions by Solicitors.

(vi) Admissions by Counsels.

(2) Informal Admissions are :

(i) By Statements.

(ii) By Conduct—

(1) Act or Omission.

(2) Silence.

(3) Acquiescence.

4. Admissions the proof which is allowed by section 21 do not Formal Admissions. Section 21 deals with informal admissions only. But it does not deal with all the classes of informal admissions. It does not deal with informal admissions by conduct. It only deals with informal admissions contained in statements. It deals with **assertions** and not **acts.**

5. **The definition of an admission as used in Section 21 is spread over sections 17-20.**

An admission is a **statement, oral** or **documentary, which** suggests an **Inference** as to any fact in issue or relevant fact made by a person specified in Sections 18, 19, 20.

Two things are necessary.

The statement may not be directly touching the fact in issue or a relevant fact. It is enough if it suggests an inference of acknowledging the fact in issue or relevant fact.

Illus :—

A sues X for damage done by K's cattle to A's crop and for the purpose of showing an admission on the part of X that his cattle had caused the damage. X offers the testimony of B to the effect that X told that X had offered a certain sum to cover the damage.

This is a statement which can sustain the inference that X's admission that his cattle did do the damage.

Illus-—

A sued *X* for the loss of his sheep alleging that X's dog had killed them. As proof he adduced evidence that X had killed his dog at the time remarking that it will not kill any more sheep.

Is this an Admission ?

II. It must have been made by persons specified in Sections 18-20.

1. Deference to sections 18-20 shows that the reasons specified fall into categories.

(1) Persons who are parties to the proceedings and

(2) Persons who are not parties to the proceedings-strangers.

Persons who are parties to the proceedings include :

(1) Parties.

(2) Agents of the parties.

(3) Persons jointly interested in the subject-matter of proceedings. e.g. partners, joint contractors.

(4) Persons from whom parties have derived their interest.

I. Strangers.

Where can a statement of a person who is a stranger and is not in any way related to a party to the proceedings mentioned in Section 18, be treated as an admission by a party.

Two cases.

(1) Statement is that of a referee—Section 20.

II. When the liability or position of that stranger is subject-matter of the proceedings.

and

(2) When the statement of the **stranger** be such as to amount to admission by him of his liability i.e. it must come within Section 17-18.

Illus. To the section—of liability.

Illus. 5 Mad. 239—of position.

A and *B* are jointly liable for a sum of money to C who brings an action against *A* alone.

A objects that he cannot singly or severally be made liable and that *B* should be joined as a co-defendant being jointly liable.

An admission by *B* to *D* as to his joint liability is relevant between *A* and *C* and may be proved.

D may prove it although *B* is not called.

§ Confession

1. Evidence may be given of a confession provided it be not expressly excluded whether made to a private person or to a Magistrate.

2. That a confession was made is a fact which must be proved like any other fact.

9 Mad. 224 (240).

5 Lah. 140.

4 All. 46 (94).

8 W.R. Cr.28.

3. **Two Questions arise :**

I. What is a Confession.

II. What are the cases in which the Evidence of a Confession is excluded.

I. What is a Confession :

1. The Act contains no definition of the term Confession.

2. The definition of the term is therefore a matter of judicial interpretation.

3. A confession is a statement. An Admission is also a statement although the one is a statement by an accused while admission may be statement by a party. Two questions arise :

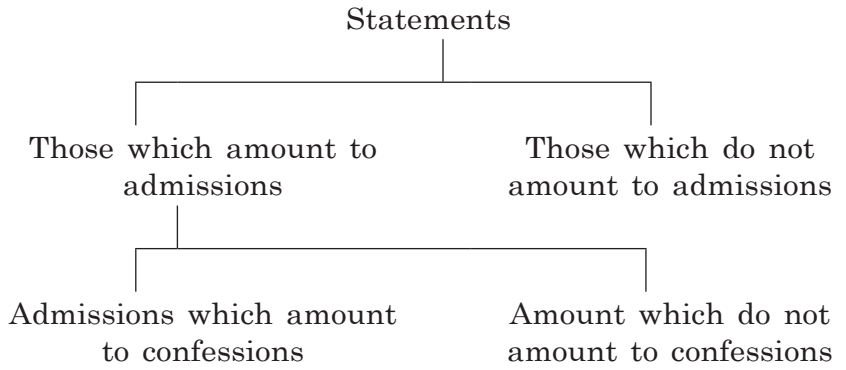
(1) What is the precise difference between Confession and Admission.

(2) When is a statement by the accused a Confession and when it is an admission.

1. Statements made by an Accused person belongs to a class which the Evidence Act calls "admissions" (sections 17,18) and……they are evidence against the maker but not in his favour.

2. Confessions are a sub-species of "statements" and a species of admissions.

3. The following table illustrates the relationship.


Statements
Those which amount to admissions
Those which do not amount to admissions
Admissions which amount to confessions
Amount which do not amount to confessions

4. The common feature of confessions and admissions is that they are both of them are **statements** made by the party to the proceedings.

5. Two questions arise.

I. A statement is an admission even though it is not made by the party himself. If it is made by a person defined in Sections 18-20 it will be an admission. Can a statement rank as a confession if it is made not by the Accused himself but by persons specified in Sections 18-20.

1. To be a Confession, it must be by the Accused himself. If it is not by the accused it is not a Confession :

1. An exculpatory statement by the Accused is not a Confession.

2. An inculpatory statement by the Accused which involves him but does not incriminate him is not Confession.

3. An inculpatory statement which not only involves but also incriminates is a Confession.

Points to be noted.

1. The incrimination may be direct or may be by inference. A statement which can by itself be the foundation of conviction is a confession.

2. The statement may be intended by the accused to be self-exculpatory but it may nevertheless be an admission of an incriminating circumstance in which case it will amount to a Confession.

6 Bom. 34.

§ Two sorts of Confessions.

1. Confessions are either Judicial or Extra Judicial.

(i) Judicial Confessions are those which are made before a Magistrate or in Court in the due course of legal Proceedings.

(ii) Extra Judicial Confessions are those which are made by the party elsewhere than before a Magistrate or in Court.

§ What are the cases in which Evidence of Confession excluded

1. The Evidence Act has considered three possible cases :

(i) Confession is made to a Police Officer.

(ii) Confession is made while in the custody of the Police.

(iii) Confession which is made to a person who is not a Police Officer and which is not made while in the custody of the Police.

With regard to (i)

It is excluded by Section 25.

With regard to (ii)

It is excluded by Section 25, 26.Exception.

Effect of Sec. 27.

6 All. 509 (F. B.)

Question. Is Section 27 an exception only to Section 26 and not to section 25 ?

or

Is it an exception to both ?

57 Cal. 1062.

With regard to (iii)

The matter is governed by Section 24.

Explanation. 1. Person in authority.
2. Appears.

Points to note :

1. Sec. 28 Confession after.....is removed.

2. Sec. 29

Queries.

I. Does Sec. 24 apply to statements made by the Accused under Sec. 287 Cr. P. C. before the Committing Magistrate.

Q. Not settled. *17 Bom. L. R. 1059.*

II. Does *Sec.* 24 apply to statement of an Approver under pardon under Sec. 339 (2) Cr. P. C. (22 *Bom. L. R. 1247).*

§ Use of Confessions.

1. Statement made by an Accused person binds him only so because of two reasons.

(i) The general rule of law is that an Admission made by one person could prejudicially affect another person.

(ii) The statement made by an accused person is not on oath.

(iii) The statement is not subject to cross-Examination.

2. But if the statement is a Confession which affects both himself and another person, then Section 30 says the Court **may** take into **consideration** the confession made by the Accused against other persons mentioned in the Confession.

3. Section 30 is therefore an exception to the general rule. The reason for this exception is the fact of self-implication which is said to take the place as it were of the sanction of an oath or is rather supposed to serve as same guarantee for the truth of the accusation against the other.

4. With regard to the use of the confession of one Accused against another accused, the important words are "**Court may take into consideration"**. This means,

(1) That the use is not obligatory. It is permissive and discretionary. Court is permitted to use it. Court is not bound to use it.

(2) Court may **Consider** it. The word consider is significant.

(1) A statement made by a **witness** is "evidence", according to the definition of that term. A confession by an accused person affecting himself and his co-accused is not "evidence" in that special sense. It is in the sense that it is a matter before the Court which it may consider. The question is while allowing it to be so considered, does it do away with the necessity of other evidence ? There is no direct answer given in the Evidence Act. But all the Courts have held that it does not do away with the necessity of other evidence. The reasons are :

(1) Confession is never a complete guarantee of its truth against the other persons whom it involves. A confession may be true so far as it implicates the maker but may be false and concocted through malice and revenge so far as it affects others.

(2) Confession cannot be placed above the testimony of an accomplice because the latter is subject to Cross Examination while the former is not and if testimony of an accomplice requires corroboration a confession must.

Conclusion. If there is

(a) absolutely no other evidence in the case, or

(b) the other evidence is inadmissible

such a Confession alone will not sustain a Conviction. There must be corroboration.

When persons are accused of an offence of the same definition, arising out of a single transaction, the Confession of one may be used against the other, though it inculcates himself through acts separable from those ascribed, to his accomplice, and capable, therefore of constituting a separate offence from that of the accomplice.

8 Bom. 223 : 7 Mad. 579

Abatement—Same offence

1. Importance of the words **made** and **proved.** Does the section include statement made by one accused at the trial which incriminates himself and implicates a co-accused ?

The answer is that it does not.

The Section is not to be read as though the words "**at the trial**" were inserted after "made" and the word "recorded" substituted for "proved".

(1890) 14 Mo. Jur. N.S. 516.

The Section does not refer to the statements made at the trial. It refers to statements **made before** and proved at the trial. The use of the term proving a Confession is inapplicable to the procedure where the Judge asks questions and the accused gives explanation.

45 All. 323.

2. Importance of **"Jointly tried"**.

In this connection two important questions arise—When one Accused confesses and in his confession implicates a co-accused and pleads guilty.

(i) In such a case can he be treated as being jointly tried with the rest, as to let in his confession under this section against co-accused ?

(2) In such a case can an Accused who pleads quilty be called as a witness against those who do not plead guilty ?

Q. I. His Evidence cannot be taken into consideration because he ceases to be jointly tried. *5 Bom. 63; 7 Mad. 102; 19 Bom. 195.*

Although it is open to the court to continue the trial without convicting the Accused who pleaded guilty, yet it is unfair to defer convicting them merely in order that their confessions may be considered against the other accused.

23 All. 53.

Q. II. This depends upon the definition of the word accused : When does an accused person cease to be an accused person ?

Until an Accused person who has pleaded guilty is convicted or acquitted, he is still an accused person and is therefore not a competent witness against the co-accused. *13 C. W. N. 552.* Until an Accused person who has pleaded guilty is convicted and **sentenced,** he is still an Accused person and is therefore not a competent witness against the co-accused. *3 Bom. L.R.*

Summary.

1. When a person pleads guilty—he ceases to be jointly tried but he does not cease to be accused person. So that on plea of guilty his confession cannot be taken into consideration against other accused because they are not co-accused jointly tried : nor can he be called as a witness because he continues to be an accused until sentenced.

2. When a person pleads guilty and he is jointly tried and ceases to be an accused person, his Confession cannot be used but he becomes a competent witness.

Relevancy of Judgments.

Sec. 40

Where the question is whether a Court ought to take cognizance of a suit or to hold such trial.

The existence of a judgment order or decree which **prevents** any Court from taking cognizance of a suit or holding a trial is relevant fact.

Comment.

1. The law by which a prior judgment order or decree prevents a civil court from taking cognizance of a suit is contained in the Civil Procedure Code and the law by which a prior judgment prevents a criminal Court from holding a trial, is contained in the Cr. P. C.

2. The relevant Sections of the C. P. C. are 11-14. Provisions summarized in Field p. 260.

3. The relevant Section of Cr. P. C. is section 434.

4. Under Section 40 a Judgment is relevant if its effect is to conclude the court.

5. Such a judgment must be just between the **same** parties and on the same issues.

6. A Judgment *inter partes* does not bind a stranger. The principle underlying the rule is that no man ought to be bound by proceedings to which he was a stranger and over which he had no control.

Exception to the Rule

(I) *Sec. 41.* enacts an exception to the rule, under it. A final Judgment of a competent court in the exercise of

(i) Probate
(ii) Matrimonial
(iii) Admirality
(iv) Insolvency.

Jurisdiction

which confers or takes away a legal character or which declares any person to be entitled to any specific thing is admissible.

Comment:

1. This means that a judgment *inter partes* is admissible in a proceedings between persons who were not parties to that proceedings.

2. This section deals with what are called judgments *in rem* without using that expression. All judgments are *inter partes*. But some *inter partes* judgments are judgments *in personam* and some are judgments *in rem*. Both are *inter partes*. Instead of defining judgments *in rem—the* section enumerates them.

3. The result is that every judgment which gives or takes away a character is not admissible. It is only judgments given in the exercise of particular kind of jurisdiction which is admissible.

Illus.

Adoption is not admissible as between strangers.

It is a Judgment which confers a statics. But it is not admissible because it is not under any of the jurisdiction mentioned.

(II) **Exception**. *Sec. 42.*

Judgment *in personam* is relevant as between strangers if the judgment relates to a subjects of a public nature.

Subjects of a public nature.

(1) Customs.

(2) Prescriptions.

(3) Tolls.

(4) Boundaries.

(5) Rights of Ferry.

(6) Sea Walls etc.

(III) **Exception Sec. 43**. Under this section Judgments *in personam* are admissible as between strangers under two circumstances

(i) Where the existence of such judgment is a fact in issue.

(ii) Where the Judgment is relevant under some other provision of the Evidence Act.

Comment:

1. The first circumstance is easy to conceive.

Illus.

(1) *A* sued *B* for slander in saying that he had been convicted of forgery. *B* justified it upon the ground that it was true.

The conviction of *A* forgery would be a fact in issue and a judgment supporting his conviction would be admissible also. *B* was not a party to that judgment.

(2) A Judgment against a surety obtained by the creditor will be admissible in a suit by the surety against the principal debtor although the principal debtor was not a party to it.

(3) Upon a trial for intentionally giving false Evidence in a Judicial proceedings the record will be evidence that there was a Judicial proceedings.

2. It is the second circumstance which has created difficulty. What are the sections under which a judgment is likely to be relevant ?

Under sec. 7—Show cause, occasion.

Under sec. 8—Motive conduct.

Under sec. 9—Facts necessary to explain relevant facts.

Under sec. 11—Facts inconsistent.

Under sec. 13—Transaction.

3. Two Questions.

I. Is a Judgment a fact.

II. Is a Judgment a transaction.

6. Cal. 171 F.B.

4. Comment on 6 Cal. 171. that it is a fact. p. 181.

Fact: (1) Anything state of things, or relation of things capable of being perceived by the senses.

(2) Any mental condition of which any person is conscious.

II Documentary Evidence.

1. The subject to be dealt with is the proof of the statements made in a document i.e. proof of the contents of a document. Oral Evidence deals with the proof of the statements made verbally by a party.

2. What are the requirements of the Rule of Best Evidence with regard to the proof of the contents of a Document? There are two requirements—

(i) In certain cases the Evidence must be documentary and not oral.

(ii) In those cases where the Evidence must be documentary that evidence must be primary.

§ Cases where Evidence must be documentary

1. Many matters are reduced to writing. But because they are reduced to writing, the Law does not require that every such case they shall be *proved* only by the production of the document. Some may be proved by oral Evidence and others must be proved by documentary Evidence.

2. For this purpose it is necessary to note that the Indian Evidence Act makes two distinctions—

(1) between documents which are **dispositive** in character and documents which are non-dispositive in character and

(2) between transactions which are required by law to be in writing and those which are not.

3. **Dispositive and non-dispositive.** Dispositive means transactions in which parties dispose of their rights, such as a Contract, grant etc., Non-dispositive means transactions in which no disposition of rights is involved.

4. The rule embodied in the Evidence Act is twofold :

(i) When a dolcument is a dispositive document and when the matter is such that the law requires it to be reduced to writing no evidence shall be given in proof of the matter except the document. In other words oral Evidence in such cases cannot be substituted for documentary Evidence. But if the document is of a non-dispositive character or if it is one which is not required by law to be reduced to writing then although the transaction may have been reduced to writing yet oral evidence may be given in proof of the transaction.

(ii) If the transaction is a dispositive transaction or is one which is required by law to be in writing then not only oral Evidence cannot be substituted for the documentary Evidence but oral evidence cannot be admitted to contradict, modify or vary the terms of the document

5. This rule is contained in Sections 91-92.

§ Exceptions to the Rule contained in Sees. 91-92.

1. There are exceptions to this rule. They fall into classes. They must be kept separate. One class deals with cases where the question is whether oral evidence may be substituted for documentary Evidence. The second deals with cases where the question is whether oral evidence may be admitted not to substitute but to modify documentary evidence where the rule requires that the Evidence shall be documentary.

§ Exceptions which permit substitution of oral Evidence for documentary Evidence.

1. They are contained in Section 91 and cover the following cases :

(i) Appointment of a Public Officer.
(ii) Will may be proved by the probate.

§ Exceptions which permit oral Evidence to be given to modify the terms of the document.

1. They are contained in Sec. 92 and cover the following cases.

2. The first thing to note is that such evidence can always be given by persons who were not parties to the document or who are not representatives in interest of the parties to the document.

3. The cases in which parties to the document or their representatives in interest can give oral Evidence are as follows:—

(i) Fact which would invalidate a document e.g. fraud, want of capacity.

(ii) Fact on which document is silent and which is not inconsistent with its terms.

(iii) Condition precedent.

(iv) Subsequent oral agreement.

(v) Usage or custom by which incidents are attached to contracts. (Bakers dozen). Provided it is not inconsistent.

(vi) Fact showing how the language is related to existing facts.

§ Cases where oral Evidence may be admitted to Explain documentary Evidence.

There are two propositions of law which arise out of the first rule of Best Evidence relating to Documentary Evidence.

1. Where the transaction embodied in a document is of a non-dispositive character or is one not required by law to be in writing the fact of the transaction may be proved by oral Evidence.

2. Where it is dispositive or required by Law to be in writing then oral evidence not only given to prove the transaction but it cannot be given to contradict, modify or amend the terms of the transaction as embodied in the document.

3. One question however ramains. Can oral Evidence be given to explain documentary Evidence ? This is a distinct question and must be, separated from the question whether evidence can be given to modify contract etc. the terms of the documentary evidence.

4. This question is dealt with in Sections 93-100.

5. In dealing with documentary Evidence disputes may arise on three counts:

(i) Disputes regarding applicability or non-applicability of die language of the document to existing facts

(ii) Disputes regarding the meaning of the documents where the language used is ambiguous or defective.

(iii) Disputes regarding the meaning of the words used in the document.

1. Under 1 there are three possible cases of disputes.

(1) Where language applies accurately to facts and the contention is that it was not meant to apply—Evidence may not be given in support of the contention to show that it was not meant to apply to the existing facts to winch they do apply—Sec. 94

(2) Where language applies to one of the existing facts but not to all of them—and the contention is that it applies to one specified fact—Evidence may be given in support of the contention to show to which particular fact it was intended to apply.—Sec. 95.

(3) Where language applies partly to one set of facts and partly to another set of facts and whole does not apply correctly to either and the contention is that it applies to one set and not to the other—Evidence may be given in support of the contention to show to which of the two it was meant to apply—Sec. 97.

1. Under the second Head of Disputes there are two possible cases :

(i) Where language is ambiguous or defective and the contention is that the parties meant a particular thing—Evidence may not be given in support of the contention to show its meaning or to supply its defects—Sec. 93.

(ii) Where the language is plain in itself but is unmeaning in reference to existing facts and the contention is that it was meant to indicate a particular thing—Evidence may be given in support of the contention to show what was meant—Sec 95.

3 Under the third head of disputes there arises the following case—

(i)…

(Space left blank in M.S.—ed.)

Difference between latent ambiguity and patent Ambiguity.

II How to prove the contents of a Document ?

1. What are the requirements of the Rule of Best Evidence with regard to the proof of the Contents of a Document ?

2. There are two requirements in this respect as laid down in the Evidence Act.

(i) The contents of a document must be proved by Primary Evidence.

(ii) The document must be proved to be genuine.

§ **What is meant by Primary Evidence ?**

Sec. 62.

(1) Primary Evidence means the document itself produced for the inspection of the Court.

Explanation

(Space left blank in M. S.—ed.)

§ How to prove that the **document is genuine** ?

1. For the purpose of proving their genuineness the Evidence divides documents into two classes (l) Public Documents and (2) Private Documents.

2. Public Document is defined in Sec. 74.

3. Section 75 declares that any document which is not a public document is a private document.

4. The rules for proving the genuineness of a document differs according as the document is a public document or a private document.

5. The mode of proving the genuineness of a public document is stated in Sections 76-78.

6. The mode of proving the genuineness of a private document is stated in Sections 67-75.

7. Private documents must generally be proved by the production of the original coupled with the evidence of the **handwriting, signature** or **execution** as the case may be. **Exception**—will may be proved by probate.

8. The genuineness of public documents may be proved either by the production of certified copies under Section 77 or if they be documents of the kind mentioned in Section 78 the various modes prescribed in that section.

9. With regard to the burden of the genuineness of a document whether it is public or private, the Evidence Act enacts certain presumptions which are contained in Sections 79-90 although they are not conclusive presumptions.

10. These presumptions fall into classes:

(1) Those in which the Court shall presume.79-85 and 89.

(2) Those in which the Court may presume.86-88 and 90.

§ When is Primary Evidence dispensed with ?

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§ How are the Contents of a document proved where Primary Evidence is dispensed with ?

1. By Secondary Evidence.

(Space left blank in M.S.—ed.)

§ What is Secondary Evidence ?

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BURDEN OF PROOF

1. The law requires the person on whom the burden of evidence is placed to discharge the burden.

2. In discharging this Burden of Proof the following considerations must be borne in mind :—

   (i) There are matters of which Proof is not required.

   (ii) There are matters of which Proof is not allowed.

3. Under (i) his burden is lightened while under (ii) his burden is increased.

blank

BURDEN OF PROOF

(i) Matters of which Proof is not required by Law

1. Matters of which Proof is *not* required by Law fall under three heads :

(a) Matters which are judicially noticed.

(b) Matters which are admitted by parties.

(c) Matters the existence of which is presumed by Law.

§ Matters which are judicially noticed

1. Sections 56 and 57 deal with facts which are judicially noticed. Section 57 enumerates 13 matters of which judicial notice must be taken.

Section 56 says that no fact of which the Court will take judicial notice need be proved by evidence. Parties are relieved from the burden of adducing evidence to prove a fact which falls under any one of the matters failing under Section 57 of which judicial notice must be taken.

2. *The principle underlying the Sections.*— Certain matters are so notorious and are so clearly established that it would be useless to insist that they should be proved by evidence

Illus. .

1 The commencement and continuance of hostilities.

2. The Geographical Divisions of the Country

These facts are so notorious that proof of them by evidence is superfluous.

3. *Matters enumerated in Section 57.*

(i) Rules having the Force or Law.

Many Acts contain a Section empowering the Local Government to make rules for carrying into effect the provisions of the Act and declaring that such rules shall have the force of Law e. g. Rules made under the Government of India Act. Such rules fall within the purview of this section.

2. Distinction must be drawn between rule having the force of law and custom which is the source of Law. A large part of Hindu Law is based on custom. But the Court will not take judicial notice of a custom. The party who relies on a custom must prove the existence of the custom. When the party has proved the existence of the custom the Court will give effect to it only if it comes to the conclusion that it is a valid custom.

3. It is true that there are some customs for the proof of which the Court does not require Evidence. But that is not because the Court is bound to take judicial notice. The Court does not require formal proof because by the rule of precedent, the Court is bound to uphold a custom, the existence and validity of which has been recognised in an earlier decision by a Court to which it is Subordinate.

(ii) STATUTES.

The statutes passed by Parliament are either general or special.

A General Statute is universal in its application and extends to all persons and to all territories.

A Special Statute is either local or personal and operates upon particular persons and private concerns.

2. All Acts of Parliament are to be presumed to be public unless the contrary be declared therein - Section 13 of 14 Vict. c. 21.

3. Judicial notice *must* be taken of all public Acts. Court is not bound to take judicial notice of a Private Act unless the particular Private Act contains a direction to the Court to take judicial notice. If it does not contain such a direction, the parry must prove that a Private Act relied upon is an Act of Parliament.

(iii) INDIAN ARTICLES OF WAR.

These are rules of discipline for Native Officers, soldiers and other persons in His Majesty's Indian Army. They are contained in the Indian Army Act of 1911.

(iv) COURSE OF PROCEEDINGS OF PARLIAMENT AND COUNCIL.

1. Course of Proceedings must be distinguished from proceedings themselves.

2. The Court will take judicial notice of the course of proceedings and not of the proceedings.

Foreign State

Court will take judicial notice whether a foreign State is recognised or not by His Majesty or by the Governor-General in Council.

State of War

The existence of a State of War between foreign States will not be taken judicial notice of.

Rules of the Road on Land or Sea

Effect of the last para.

1. Court can refuse to take judicial notice under certain circumstances of matters of which they are bound to take judicial notice.

2. Party is bound to produce the necessary material to enable the Court to take judicial notice.

Illus.

Gazette must be produced if the party wishes the Court to take judicial notice of a Proclamation.

Mode of Proof

1. The general rule regarding mode of proof may be stated thus:

The law requires evidence to be given by a person—

(i) Who is present in the Court.

(ii) Who is legally competent as a witness.

(iii) Upon oath or affirmation.

(iv) In regular course of Examination.

(v) Subject to contradiction as to facts.

(vi) Subject to discredit as to veracity.

I. Presence in Court.

1. It is a duty of the citizens to appear and testify to such facts within their knowledge as may be necessary to the due administration of justice. It is a duty which has been recognised and enforced by the Common Law from an early period.

2. The right to compel the attendance of witnesses was incidental to the jurisdiction of the Common Law Court, and the statutes have conferred this power upon other officers such as Arbitrators. Every Court having power definitely to hear and determine any suit, has by the Common Law, inherent power to call for all adequate proof of the facts in controversy and to that end, to summon and compel the attendance of witnesses before it.

3. The wilful neglect to attend and to testify after proper and reasonable service of the *subpoena* and in civil cases, after payment or tender of the witnesses fee of waiver of payment is a contempt of Court.

4. The process to compel attendance of witnesses to give testimony or to produce documents is not provided for in the Evidence Act. It is provided for in the Civil and Criminal Procedure Codes.

5. The following matters are in the Country provided for by the Civil and Criminal Procedure Codes.

(i) Summoning of witnesses :

Civil Pro. C.	O. XII	
Cr. Proc. C.	68-74	(Summons)
	90-93	(Other rules regarding Process)
	328	(Summons on Juror or Assessor)
	244	(Issue of Process in Summons Cases)
	254	(,, ,, Warrant cases)
	256	( )
	257	( )
	540	(Power to summons material witness on Examine person present.)

(ii) Production of documents and other things :

Civil P.C.	O. XI, XVI.	
Cr. P. C.	94, 95	(Summons to produce documents or other thing)
	96-99	(Search warrants)
	485	(Consequences of refusal to produce)

(iii) Expenses of the witnesses:

Civil P. C. O. XVI. R. 2-4

Cr. P.C. 244, 257.

(iv) The freedom of complainants and witnesses in criminal cases from police restraints.

Cr. P. C. 171.

(v) Recognizance for the attendance of complainants and witnesses in Criminal proceedings.

Cr. P.C. 217, 170.

NOTE.—Not provided for in Civil cases.

(vi) Exemption of witnesses from arrest under Civil process.

Civil Pro. Code S. 135

NOTE.—There is no protection given against Criminal process.

6. Not only is there provision for summoning a witness, there are provisions for compelling his attendance.

(1) Non-attendance in obedience to a Summons is made an offence by Section 174, 175,I. P. C.

(2) Non-attendance in obedience to a summons may be followed by *Warrant of arrests* under Sections 75-86 and by Proclamation and Attachment under Sections 87 89 of the Cr. P. C.

(3) Non-attendance may further render a witness liable to a Civil action for damages under Section 26 of Act XIX of 1853 (in force in Bengal) and under Section 10 of Act X of 1855 (in force in Bombay and Madras).

24 W. R. 72.

7. Although the law requires persons summoned as witnesses to *attend in person,* the law also excuses non-attendance in certain cases.

(i) By reason of non-residence within certain limits.

Civil P. C. O. XVI R. 19.

(ii) By reason of the witness being a *purdanashin* lady.

Civil P. C. Section 132.

(iii) By reason of the witness being a person of Rank.

Civil P. C. Section 133.

§ The witness must be competent to give evidence

1. The question of competency of a person may be considered from two points of view

(1) From the point of view of his intellectual capacity

(2) From the standpoint of his veracity.

I. Competency from the standpoint of intellectual capacity.

1. Section 118 deals with the question of competency from the standpoint of intellectual capacity.

2. The rule enacted in Section 118 is a rule which recognises the power of understanding as the *only* test of competency.

3. As every normal person has the intellectual capacity to understand things and to grasp their importance, Section 118 declares that *all persons* are competent to testify unless they suffer from want of understanding.

4. The law of competency is therefore practically the law of incompetency. A person is a competent witness who is not incompetent.

5. Incompetency therefore means want of understanding. This want of understanding may arise from

(i) Tender years.

(ii) Extreme old age.

(iii) Disease whether of body or mind.

(iv) Any other cause of the same kind.

6. *Comment.*

(i) *Tender year or* (ii) *Extreme old age*— is not defined.

A boy of 7 may not be incompetent but 12 may be, if the former has an understanding which the latter has not. A man of 60 may be incompetent and a man of 80 may not be.

The test is not the age. The test is the Existence or non-Existence of understanding.

(iii) *Disease of the body*

A witness may be in such extreme pain as to be unable to understand or if able to understand to answer questions. He may be unconscious, as if in a fainting fit, catalepsy or the like. Here again it is a question of fact whether in any particular case the disease of the body is such as to deprive a person of his power of understanding.

(iii) *Disease of the mind*

1. This contemplates the case of an idiot and a lunatic, both suffer from the disease of the mind.

2. An idiot is one who is born irrational, without the reasoning faculty. A lunatic is one who is born rational, has subsequently become irrational and lost his reasoning faculty.

3. A lunatic is either a *monomaniac* or is a maniac for the time being. That being so, a lunatic is not incompetent merely because he is a lunatic. Lunacy does not mean complete annihilation of understanding. If it is general lunacy, he may be lucid at intervals. If he is a monomaniac, his understanding about other matters may be clear.

Illus. of partial lunacy.

(1) Murder discussion in Lunatic Asylum.

(2) Interview by a person with his lunatic friend in the asylum and his remark about time.

Illus. of Monomaniac

(1) R. V. Hill—Hill was tried for murder. Donelly witness—lunatic—suffered from the delusion that he had 20000 spirits about him which were continually talking to him.

That being so a lunatic can be a competent witness.

This is recognized in the Explanation.

(iv) *Any other cause.*

This means any other cause depriving a person of his power of understanding. e.g. *drunkenness.*

Some of these disabilities are coextensive with the cause, therefore, when the cause is removed the witness becomes competent.

e.g. When pain ceases
drunkenness ceases
Lunacy ceases

Whether there is understanding or not in the witness, is a matter which is determined by the Court by questioning the witness.

§ Accused as a witness

1. While all persons who have understanding are competent as witnesses, there is one exception to the rule. That is, an accused person cannot be examined as a witness in a criminal case in which he is being tried.

There is a case of the disease of the body which does not affect the mind of the understanding. Dumbness is such a disease.

Section 119 deals with the case of such a witness. The Section does not declare him to be incompetent On the other hand, it treats him as a competent, and permits him to give evidence in any manner by *writing* or by *signs* made in open Court.

§ Competency from the standpoint of the veracity of the witness

1. The motives, which prevent a person from telling the truth, are more numerous in judicial proceedings than in ordinary affairs of life because of the fact that, result of a judicial proceeding cannot be flouted and are binding in a more absolute manner than other informal proceedings of a Panch are. Consequently the law at one time rendered many people intellectually competent incompetent to give evidence in a cause.

2. Formerly, therefore, not only mental incapacity was a good ground for incompetency but *interest* was also a ground for incompetency. Reason was that, an interested person would not tell the truth. Consequently, at one time, the following persons were deemed incompetent.

1. Parties to the suit.
2. Husband and wife against each other.
3. Accused against himself.
4. An Accomplice.

3. This view of the law is now changed and the principle has undergone a change. Question of competency or incompetency has been converted into a question of credibility or incredibility. So that every son is rendered competent to give evidence but it is left to the Court to believe him or disbelieve him.

4. This new principle is embodied in Sections 120 and 133.

§ Section 120

I. Civil Proceedings

(i) The parties to the suit are competent witnesses.

(ii) The husband and wife of any party to the suit are competent witnesses.

II. Criminal Proceedings

1. The husband or wife of the accused is a competent witness either for or against.

§ Section 133

1. This section deals with the competency of an accomplice. The evidence of an Accomplice is held untrustworthy for three reasons:

(i) because an accomplice is likely to swear falsely in order to shift the guilt from himself.

(ii) because an accomplice as participator in crime, and an immoral person, is likely to disregard the sanction of the oath.

(iii) because he gives his evidence under a promise or hope of not being prosecuted, if he discloses all he knows against his participators in the crime.

2. But his evidence has to be admitted from necessity, it being often impossible without having recourse to such evidence to bring the principal offenders to justice.

§ Difference between the value of Evidence of Accomplices and other persons

1. Persons other than accomplices are not only competent but are also credible. An Accomplice on the other hand is only competent but is not credible.

2. Witnesses may be incredible in the eye of the Judge. But they are not incredible in the eye of the law. An Accomplice has a statutory incredibility attached to him by the law.

3. This statutory incredibility arises from illustration (b) to Section 114 of the Evidence Act. The presumption is sanctioned by the Act and although it is rebuttable, it would be an error of law not to disregard.

4. For attaching this statutory incredibility, it would be necessary to determine whether the witness is an Accomplice. The term is not defined.

(i) An Accomplice is a person who is concerned with another or others in the commission of a crime. He is a participant. But it is not every participation in a crime which makes an accomplice. Much depends on the nature of the offence and the extent of the complicity of the witness in it.

5 W.R.Cr.59.

(ii) An Accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act, that he can be justly indicted with the Accused who is being tried.

27 Mad. 271.

§ Effect of Sections 120 and 133

1. The sections enumerate certain persons as being competent to give evidence. Question is, Are other persons not competent ? The sections are not to be understood to mean that these are the only persons who are competent and others are not. The effect of the sections is that all persons are competent including those mentioned in Sections 120 and 133.

2. The reason why it was necessary to specifically deal with these classes is, because under the earlier law they were incompetent. The ban against them had to be lifted and therefore the specific provisions relating to them. Other classes of persons were already deemed to be competent and it was unnecessary therefore to say anything about them.

3. The Effect of Sections 120 and 133 is this, that not only

(1) Parties to suits.

(2) Husbands and wives.

(3) Accomplices.

are competent witnesses, but

(1) Jurors and Assessors—Section 294 Cr. P. C.

(2) The Executor of a Will

(3) An Advocate for a party

may be competent witnesses in the case to which they are a party, although it is a cause in which they are interested.

Evidence must be given on Oath

1. Oath is not a requirement of the Indian Evidence Act. Left to the Indian Evidence Act, evidence by a witness would be legal evidence although the witness had given evidence without taking oath.

2. Oath is a requirement of the Indian Oaths Act X of 1873. Section 5 of the Oaths Act lays down.

1. That oaths or affirmation *shall* be made by the following persons.

(a) all witnesses.

(b) interpreters.

(c) Jurors.

3. Section 6—permits a person who objects to the oath to affirm.

4. Section 14.—Every person giving evidence before any Court or person authorised to administer oaths or affirmation shall be bound to state the truth on such subject.

5. There are three questions that arise for consideration.

(1) Can a Court decline to administer oath or affirmation to a witness ?

(2) Can a party decline to take oath or make affirmation?

(3) Effect of the refusal of a witness to take oath or affirm and of the failure of the Court to administer oath.

Answer to Question 1. It is a statutory duty of the Court to administer oath.

There is one qualification, namely, Court is bound to administer it to a person who is competent and not bound to administer it to one who is incompetent, *e. g.* a child.

6 Pat. L. J. 147.

Answer to Question 2. The answer is given in Section 12. Party shall not be compelled to make it. But the Court is to make a record of his refusal and the reasons, if any, given by him.

Answer to Question 3.

Part I—Effect of the refusal of the party to take oath or make an affirmation.	1. .....
	2. Such refusal only affects the value of the evidence.
Part II—Effect of the failure of the Judge to give oath.	1. The evidence remains admissible.
	2. Obligation to tell the truth remains.

6. The Provisions of the Oaths Act in India are not so strict as they are in England.

(1) Oath is not a necessary condition precedent for the obligation of telling the truth. It is necessary merely to remind a witness of its sanction.

(2) The Indian Act condones the failure to remind or failure to take oath. The English law makes the evidence inadmissible.

IV. COURSE OF EXAMINATION

1. There are two possible ways in which a witness can depose

(i) By narrating the facts.

(ii) By answering questions put to him.

2. The Evidence Act provides that the testimony of a witness shall be taken in the form of Examination, not in the form of a narration. The reasons why the law prefers examination as the mode of giving evidence are to be traced to the rules of relevancy. A person is permitted to give evidence of matters which are relevant. He is not permitted to give evidence of all matters relating to the issue. Matters which are related to the issue are not necessarily relevant to the issue and under the Evidence Act it is the duty of the Judge to decide whether any particular fact is relevant or irrelevant and to rule out their relevant then and there.

If a witness is permitted to give his testimony in the form of a narration two things will happen :—

(i) The witness will in all probability tell *all* facts relevant as well as related and this introduce irrelevant matter and

(ii) The action that a Judge may be able to take to rule out irrelevant matters will be *ex-post facto*.

On the other hand if the witness was required to give his testimony in the form of answers to questions, two objects will be achieved:—

(i) his testimony could be made to confine to relevant matters only not being permitted to wander and

(ii) the Court can immediately check and rule out the introduction of irrelevant testimony.

3.

4. With regard to the examination of witnesses, there are two questions which are distinct and which are regulated by different law. The *order* in which parties are to produce their witnesses for examination, and the *course* of Examination to which each witness is to be subjected when he is produced before the Court, are two separate questions.

Sections 135,138

The order in which witnesses are to be produced by the parties is a matter which is regulated by the Civil and Criminal Procedure Codes. While the course of examination to which a witness is to be subjected, when produced, is laid down by the Evidence Act.

§ Order of Production of Witnesses

1. *In Civil cases*	*In Criminal cases*	
Order XVIII Rule 1.	Summons cases	224 Cr. P. C.
	Warrant cases	252
		254
		257
	Summary cases.	262

Rule seems to be this.

1. The first question to be determined is who has the right to begin.

2. The right to begin depends upon on whom is the burden of proof.

§ Course of Examination

1. The Course of examination of a witness prescribed by the Evidence Act is to consist of *3* parts.

Section 138

(i) Examination in chief.

(ii) Cross Examination.

(iii) Re-Examination.

2. Examination in chief is the Examination of the witness by the party who calls him.

Section 137

Cross Examination is the examination of the witness by the adverse party.

Re-Examination is the examination of the witness by the party who called him subsequent to his cross examination by the adverse party.

Questions to be considered

3. Examination in chief is a matter of choice. No one can compel a party to call witnesses. But if witnesses are called and examined in chief, then the question that arises is this:— Is Cross-Examination and Re-Examination a matter of *right* or a matter of *privilege,* which may be granted or withheld according to the discretion of the Court ?

The answer to this question is that Cross-Examination and Re-examination are matters of right and not of privilege. The Court cannot stop a party from Cross-examining or Re-examining a witness who has been examined in chief by the party. What about a witness who is *called by the Court* and not by any party to the proceedings ? Is there any right to cross examine such a witness ? If so which party ? The Evidence Act makes no provision for such a case. It has however been held that a witness summoned and examined by the Court *cannot* as of right be Cross-Examined by either party without the permission of the Judge.

(1894) 2 Q. B. 316,
3 B. L. R. 145
11 W.R. 110
24 Col. 288
5 Cal. 614
16 W. R. 257.

4. When can the right to Cross examine be exercised ?

As to this, there is a difference between civil cases and criminal cases.

(i) In *Civil Cases,* the right must be exercised immediately. It cannot be postponed to a future date.

(ii) In Criminal Cases, in a summons case before the Magistrate and in the Sessions case the right must be exercised immediately. But in a warrant case, the accused has a right to postpone the Cross-examination of the prosecution witness to the next date of hearing.

The case of a person who is called as a witness by both the parties : In a litigation between A and B, C is cited as a witness by both A and B. First he is called as a witness by A on his behalf. After his cross-examination by B and Re-Examination by A, he is called as a witness by B on his behalf.

Can B Cross-examine C ?

There is no specific provision answering this question in the law of evidence. It is a question of judicial opinion. On this question there is a divergence of view.

(1) One view is that, when a person once gets a right to Cross-examine a witness, that right continues to him at all subsequent stages of the case against that witness, no matter in what role the witness reappears, so that, even if he comes as his own witness he can Cross-examine him. This view is based on the theory that every witness is favourably disposed towards the party calling him.

(2) The other view is that, each party should alternatively have the right of X Examining such a witness as to his adversary's case, while both should be precluded in the course of the respective Examinations-in-Chief from leading questions with regard to their own case. So that a Plaintiff may Cross-Examine any of his own witnesses, on hearing afterwards called on behalf of the Defendant.

The better opinion is that the right to X Examine does not survive and he cannot be asked leading questions on his Second Examination. If the adversary again called the same witness who has been examined by the other side and Cross-examined by him, he could clearly examine him in-chief.

This rule appears to have been adopted by the Evidence Act

5. Does this prescribed course of Examination apply to every witness ?

1. There are three sorts of witnesses who are called before the Court:

(i) Those who are called to depose to relevant facts.

(ii) Those who are called to speak to character.

(iii) Those who are called to produce documents.

2. With regard to witnesses who are called to depose to relevant facts or to speak to character, they are subject to the full prescribed course of examination, Cross-examination and Re-examination. But the witness, who is called to produce documents, stands on a different footing. He is not a witness and therefore cannot be cross-examined.

6. Can one Co-accused Cross-examine a witness called by another co-accused ? Can one Co-defendant Cross-examine another co-defendant or the witness called by a co-defendant ?

(1) The Section does not make special provision for the case of Cross-examination by co-accused and co-defendants.

(2) The Evidence Act gives a right to Cross-examine witnesses called by the *adverse* party and to no other. Consequently, it follows that one co-accused can cross-examine a witness called by another Co-accused only when the case of the second is adverse to that of the first.

21 Cal. 401.

(3) The rule of English law in this respect is different. Under the English law the right of a defendant (and *a fortiori* an Accused) to Cross-examine a co-defendant or co-accused is, according to the English-cases, is unconditional and not dependent upon the fact that the cases of the accused and co-accused are adverse or that there is an issue between the defendant and his co-defendant. And one co-defendant may Cross-examine a co-defendant's witness and the co-defendant if he gives evidence.

The reasons for this English rule are :

(i) It is settled that the evidence of one party cannot be received as evidence against another party unless the latter has had an opportunity of testing it by Cross-examination.

Allen vs. *Allen. L. R. P. D. (1894) 248/254.*

(ii) It is also scaled that all evidence taken, whether in examination-in-chief or Cross-examination, is common open to all the parties.

Lord vs. *Coloin. 3 Drewery 222.*

(iii) It follows that if all evidence is common and that which is given by one party may be used for or against another party, the latter must have the right to Cross-examine.

7. What is the effect of a default in the course of the examination of a Witness prescribed by law ?

(1) This question can arise only when there is a default in Cross-examination or Re-examination. Until there is Examination-in-Chief, there is no evidence at all in the legal sense of that term.

It is only when evidence has been given by the witness in his Examination-in-Chief that this question can arise. The question to be considered reduces itself to the effect of default of Cross-examination or Re-examination on the testimony of a witness.

(2) Such default takes place when the witness dies or falls ill, becomes insane or paralytic or disappears after his Examination-in-Chief or before X Examination.

(3) The Evidence Act does not in clear terms state in express terms what the effect will be. Whether, for want of Cross-examination or Re-examination of a witness, his testimony given in Examination-in-Chief will cease to be evidence in the legal sense of the word and will have to be cancelled and excluded from the consideration of the Court or whether it will merely affect its evidentiary value, is not stated in the Evidence Act. The question is determined by Judicial interpretation.

According to judicial interpretation, two propositions are well established.

(1) Such default does not make the evidence inadmissible. It only affects its credibility.

(2) Whether it would be credible or incredible, must depend upon the reasons for the default in Cross-examination.

There are two ways in which default in X Examination may take place:

(i) Where a party could have X Examined but did not do so.

(ii) Where a party would have X Examined but could not do so.

The question of credibility could arise only in the second case. It could not arise in the first. The Law can give an opportunity and nothing more. If opportunity is not taken, the law holds there is no injury.

§ Regular Course of Examination

1. The Course of examination of a witness must be *regular*.

2. A Course of Examination to be *regular* must be in accordance with the rules laid down in the Evidence Act ?

3. The rules for a Regular Course of Examination relate to :

(i) Scope of Examination.

(ii) Manner of Examination.

(iii) Limits of Examination.

§ Scope of Examination of a witness

Under this head, we must deal with matters on which it is permissible to a party to ask questions to a witness.

1. The objects underlying the examination of a witness are chiefly two :

(i) to elicit from him what he knows.

(ii) to test the truth of what he states.

2. The object of testing the truth of what the witness has stated can be achieved, only if, the Examination of the witness is extended to such questions as relate :

(i) to the corroboration and contradiction of the witness.

(ii) to the confirmation or impeachment of the credit or character of the witness.

3. Under *Scope of examination,* we shall therefore be concerned with Rules relating to the following subjects:

(i) Rules relating to matters which can or cannot be elicited in the course of the Examination of the witness.

(ii) Rules for testing the credibility or incredibility of a witness.

(iii) Rules regarding the corroboration or contradiction of matters deposed to by the witness.

1§ Matters which can or cannot be elicited in the course of an Examination

1. This question is dealt with by Sections 138 and 146. The effect of these sections is that there axe two kinds of matters which can be elicited from a witness in the course of his examination.

(i) Matters which are relevant to the issue and

(ii) Matters which relate to the credibility of the witness.

These are the only two matters on which a witness can be examined.

2. But every party is not entitled to examine a witness on both these matters

(1) With regard to matters which are relevant, both parties are entitled to examine the witness, the party who called him and the adverse party. Indeed the rule is not that the party is entitled to examine the witness on all relevant matters ; the rule is that the examination of a witness must be confined to relevant facts.

This rule applies not only to Examination-in-Chief but also to Cross-examination. The only difference is that Cross-examination need not be confined to matters raised in Examination-in-Chief. It may be extended to other matters not raised in Examination-in-Chief. But these other matters must also be *relevant* matters. Nothing that is irrelevant is permissible either in Examination-in-Chief or Cross-examination.

There is therefore no difference in the scope of the Examination-in-Chief or Cross-examination so far as relevant matters are concerned.

(Here concludes Page 203 of the M.S. Page 204 is missing. Following text starts from Page 205—ed.)

There is agreement on the absence of the particular virtue of truth telling has the necessary effect of shaking the man's credit and therefore such questions as relate to this aspect of the witness character are always permissible and can be asked in Cross-examination.

But there is no general agreement as to the absence of general good character on the veracity of a witness.

There are two views on the subject. One is that, bad general character necessarily involves an impairment of the truth telling capacity and therefore to show general moral degeneration is to show an inevitable degeneration in veracity. The other view is, a bad general disposition does not necessarily or commonly involve a lack of veracity and that, therefore, a bad general disposition is of no probative value for the purpose of shaking a witness's credit.

Under the English law, for the purposes of shaking credit by injury to character, general character is excluded and character for veracity only is taken into account.

§ Impeachment of Character otherwise than by Cross-examination

Section 155

1. Impeachment of character of a witness is permitted by the production of independent evidence under the provisions of Section 155.

2. *This again is a right of the adverse party.* So that a party who calls a witness cannot impeach the character of that witness by evidence of other persons.

3. *The impeachment may be undertaken in the following ways :*

(1) by evidence of persons who testify from personal knowledge that the witness is unworthy of credit.

(2) by proof that has been bribed or accepted the offer of a bribe or has received other corrupt inducement to give his evidence.

(3) by proof of former statements *inconsistent* with any part of his evidence which is liable to be contracted.

(4) by proof in rape that the prosecutrix was of generally immoral character.

3 § Rules regarding corroboration and contradiction of a witness

1. *Definition of a Corroborative Evidence*—Corroborative evidence simply means evidence which has the effect of confirming the truthfulness of the testimony of a witness. It is evidence which makes the assurance of a witness doubly sure.

2. *Kinds of Corroborative Evidence.*—The Evidence Act recognises two kinds of Corroborative Evidence.

(i) Evidence of facts other than relevant facts.

(ii) Additional evidence of.

Section 156.

§ Corroborative Evidence of facts other than relevant facts

There are two requirements which must be fulfilled.

(i) The Corroborative circumstance of which evidence is being given must have been observed by the witness *at or near to the time* at which the relevant fact occurred.

(ii) The Court must be of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact

Illus.

A and B jointly committed robbery at a certain place. B is charged and A, the accomplice gives evidence against him. In his evidence A describes various incidents unconnected with the robbery which occurred on the way.

Prosecution call independent witnesses to prove the truth of the testimony of the accomplice relating to the *incidents on the way.*

The relevant question is whether *B* committed robbery. The Evidence tendered by the prosecution does not relate to the relevant question. Still it will be allowed as a corroborative evidence if the Court is of opinion that it will help to corroborate the testimony of the accomplice as to robbery.

§ Corroborative Evidence by way (of)* Additional Evidence of relevant facts

Section 157.

1. *This can be done by giving evidence of any former statement made by the witness relating to the same fact.* This is based upon the principle that he, who is consistent, deserves to be believed. The mere fact of a man, having on a previous occasion made the same assertion, may add little or nothing to the truthfulness. One may persistently adhere to falsehood once uttered, if there is a motive for it so that if consistency was conclusive nothing would be easier for designing and unscrupulous persons to procure the conviction of any innocent man, who might be obnoxious to them, by first committing offences and afterwards making statements to different people and at different times or places implicating the innocent man. *R.* vs. *Malappa, 11 Bom. H. C. R. 196 (198).*

2. The previous statement may be a statement made on oath or otherwise and either in ordinary conversation or before some persons who had authority to investigate and question the person who made it. It may be verbal or in writing. *There is one distinction between a previous statement made before a person who has authority to investigate and a previous statement* made before a person not so authorised. If not made before any

*Word inserted—ed.

person legally complain to investigate the fact, then to be admissible, must have been made at or about the time when the fact took place. This condition does not apply to a previous statement made before a person having authority to inquire.

25 Mad. 210.

Illus.

(i) A statement by a girl, alleging that she was raped made immediately after the rape, is admissible.

(ii) The dying declaration of a man, who chances to live, is admissible as a corroborative piece of evidence.

(iii) The first information given to the police is admissible as corroborative evidence of the testimony of the informant.

(iv) The Panchnama is admissible as a corroborative.

Two points must be urged by way of caution.

(1) The use of statements made to the police in the course of investigation under Section 162, Criminal Procedure Code. These are also *previous statements* made before a person who is authorised to investigate.

Can they be used for the purposes of corroboration ?

At one time it was held that they could be so used.

36 Cal. 281.

35 Mad. 397.

39 Bom. 58.

The Amendment to Section 162 of the Criminal Procedure Code excludes both the written record and *viva voce* statement made to the Police. Though previous statements, they cannot be used as a corroboration.

(2) The distinction between corroborative evidence and substantive evidence is important, because, on this depends the use of corroborative evidence. Corroborative evidence is not substantive evidence.

Illus.

In a trial of a prisoner, the depositions of witnesses given in a previous trial of other persons charged with having been

engaged in the same offence, were used against him. The witnesses instead of being examined in the ordinary way, were re-sworn and said "I gave evidence before in this Court and that evidence is true".

Held that this evidence was inadmissible. It was only corroborative evidence and could be used only when substantive Evidence is given. If substantive Evidence is not given, then corroborative evidence cannot be given.

12 W. R. Cr. 3.

Similarly—If a panch does not identify the accused, the Panchanama of identification as corroborative evidence could be inadmissible.

In this connection there arises the question of giving corroborative evidence of a person who cannot be called to give substantive evidence by reason of the fact that the witness is dead or who cannot be found or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense, which under the circumstances the Court thinks unreasonable.

Section 158 permits corroborative evidence being given although no substantive evidence is tendered. This is an exception to the general rule. That exception applies only *if the witness cannot be procured.*

This is an exception created by Statute. Another exception created by Statute is contained in Section 288 of the Criminal Procedure Code. By that Section, evidence before the committing Magistrate is treated as evidence before the Sessions Court for *all* purposes i.e. substantive Evidence of all facts deposed therein.

§ 3/2 § Rules regarding the contradiction of a witness

1. This is a matter which must necessarily be governed by two considerations :

(i) The object of inquiry by the Court is to get at the truth and therefore contradiction must be permitted.

(ii) If contradiction is permitted, the inquiry will be endless and therefore there must be some limit on the process of contradiction.

2. *In what cases can a witness be contradicted ?*

The Section which deals with the contradiction of a witness is Section 153. For the purposes of contradiction, the Section divides the answers of the witness into two classes (1) Answers to questions relating to relevant facts and (2) Answers to questions relating to the credit of a witness.

3. *Are the answers of a witness to questions relating credit liable to contradiction ?*

The answer given in Section 153 is positive to the effect that such answers shall not be contradicted.

There are only two exceptions to the rule :

(i) If previous conviction is denied, you can contradict it by evidence.

(ii) If the witness denies partiality he may be contradicted.

In this connection, it must be borne in mind that under the provisions of Section 155, the answers of a witness giving reasons in X-Examination for his belief in the untrustworthiness of another witness are not liable to be contradicted.

In all these cases, where the answers of a witness to questions relating to credit are not liable to contradiction, the law provides that if their answers are false they may afterwards be charged with giving false evidence.

4. Are answers of a witness to questions on relevant facts liable to contradiction ?

(1) Section 153 is negative in character and merely states cases in which contradiction is not allowed. It does not state in what cases contradiction will be allowed.

(2) It does not include answers to relevant questions in its prohibition. By implication it seems to permit contradiction of such answers.

(3) There is illustration (c) to Section 153 which shows that the legislature intended to permit contradiction of such answers.

5. Section 153, therefore, lays down the rule that you can contradict answers to relevant questions. But you cannot contradict answers to questions on credit.

§ Contradiction on relevant facts

1. The next question is; *Is such contradiction permitted to the party who called the witness or Is it permitted to the adverse party only ?*

2. That, a party may contradict the answers given by the witness called on behalf of the adverse party, is beyond question and is always permissible. The defence witnesses are thereto contradict. But it does not seem to be quite so obvious in the other case. A witness is called on behalf of a party. In answer to a question on a relevant fact, he gives a particular answer which the party who called him feels is untrue. Can the party, who called him, call another witness to contradict him ?

3. *The answer is that he can.* The law seems to make difference between discrediting his own witness by attacking his general character and showing that in a particular respect his testimony is incorrrect.

§ Manner of Examination of a Witness

1. *Manner of Examination means the manner of interrogating the witness,* i.e. the manner of putting questions.

2. This matter is left not to the discretion of the party interrogating the witness, but is regulated by law.

3. From the standpoint of the manner of putting questions, questions are either leading questions or not leading questions.

4. A leading question is generally said to be a question which can be answered by a mere yes or no. Although, all such questions undoubtedly come within the rule, the character of leading question is not limited to them.

The Evidence Act defines a leading question as one, which suggests a particular answer, which the questioner expects to have from the witness. ?

Illus.

On a charge for murder by stabbing, to ask a witness 'Did you see the accused covered with blood and with a knife in coming away from the corpse ?' is a leading question.

5. A distinction must be made between two sorts of leading questions,

(i) A leading question which suggests the answer.

(ii) A leading question which directs the attention of the witness to the *subject* respecting which he is questioned.

As an illustration of the second sort of leading question, take the following:

A was sued for defamation by *B* for having said in a conversation to *C* that *B* was in bankrupt circumstances and that his name would appear in the London Gazette among bankrupts. Question was asked to the witness.

"*Was anything said about the Gazette ?*"

This is not a leading question in the sense of a question which suggests an answer. It is a leading question which directs the attention of the witness to the *subject* about which he is being questioned.

The manner of interrogation in Examination-in-Chief varies from the manner of investigation in Cross-examination.

In Cross-examination, a witness may be interrogated in the form of leading questions. But leading questions must not be asked in Examination-in-Chief, if objected to by the opposite party.

In Examination-in-Chief, the witness must be asked merely such question as "What did you see ?" "What did you hear ?" "What happened next ?"

Reasons for the Rule

(1) A witness has a bias in favour of the party calling him and hostile to the opponent. He is, therefore, likely to agree to the answers suggested to him by the pleader of the party.

(2) That the party calling a witness has an advantage over his adversary, in knowing before hand what the witness will prove, or at least expected to prove ; and that, consequently, if he were allowed to lead, he might interrogate him in such a manner as to extract only so much of the knowledge of the witness as

would be favourable to his side, or even put a false gloss upon the whole.

Exceptions to the Rule.

Leading questions are permissible in Examination-in-Chief in the following cases :—

(i) Where the matters are merely introductory, such as a name, occupation of a witness.

(ii) Identification of persons or thing.

(iii) About matters which are not in dispute.

(iv) When a question from its very nature cannot be put except in a leading form.

(v) To contradict evidence already given by a witness on the other side.

E. G.—If the Plaintiff has sworn that the defendant said, "The goods need not all be equal to sample", the Defendant can and should be asked, "Did you ever say to the Plaintiff that the Goods need not all be equal to sample or any other words to that effect ?"

(vi) Where the witness is hostile. Difference between a hostile and a witness who is unfavourable.

A Witness should always state what happened according to his own personal recollection, and not according to what he has since been told.

Suppose the witness cannot recall the facts and his memory fails, what is to be done ?

There are two ways open :

(1) To assist the memory of a witness by leading questions.

(2) To permit him to refresh his memory by permitting him to refer to any writing which is a record of the fact.

Examples of writings used to refresh memory are—

(i) Entries in diaries.

Entries in call books.

Entries in account-books.

Entries in Railway time-tables.

A witness may refresh his memory by referring to any writing or document *made by himself.* But he may also refresh his memory from documents made by other persons under his immediate observation.

The only condition is that the document must have been made at the time when the transaction was fresh in his mind or was *read by him,* if made by another person, at the time when the transaction was fresh in his memory and knew it to be correct.

A copy may be used if the original cannot be produced for reasons which satisfy the Court for its non-production.

Refreshing memory by inspecting a writing or document does not make it documentary evidence. So that a document which could be inadmissible in evidence for want of stamp would be admissible for refreshing memory.

There is a difference between referring to a writing for refreshing memory and using a document for corroboration.

A document which could not be used for corroboration can be used for refreshing.

Example : USE OF POLICE DIARIES

In connection with a document used for refreshing memory, it must be ascertained whether a memorandum does assist the memory or not.

The law, therefore, requires that such writing shall be produced and shown to the adverse party, if he requires it and he may cross-examine the witness thereupon, if he so desires.

8 Cal. 739 (745).

The grounds upon which the opposite party is permitted to inspect are threefold ; (i) to secure the full benefit of the witness's recollection as to facts; (ii) to check the use of improper documents and (iii) to compare his oral testimony with his written word.

Can the adverse party compel the witness to refresh his memory by referring to the writing.

It may be very advantageous to an accused person that Police Officer should state a certain fact. The Police Officer does not recall fact and would not refresh his memory by reference to his diary.

(8 Cal. 154), (8 Cal. 739) Says he cannot be compelled.

A. 1. R, (1924) Pat. 829, Says he can be compelled.

§ On the Limitations on the Examination of a witness

1. The subject-matter to be considered under this head relates to the questions a witness is bound or is not bound to answer.

2. The general rule is that a witness must answer *all* questions put to him.

Section 132.

Section 132 puts the matter negatively.

3. This rule is subject to *two* qualifications:

(i) Certain questions a witness cannot be *compelled* to answer.

(ii) Certain questions a witness is not to be empowered to answer.

4. Sections which deal with questions which cannot be *compelled* to answer are : 121, 122, 124, 125, 129.

5. Sections which deal with questions which a witness is not empowered to answer are : 123, 126, 127, 128.

DISCHARGE OF THE BURDEN OF PROOF

1. Effect of Evidence may be :

(i) To prove a fact.

(ii) To disprove a fact.

(iii) To fail to prove and therefore disprove.

2. Burden of Proof is discharged when :

(i) The fact required to be proved is proved.

(ii) The fact required to be disproved is disproved.

3. Burden of proof is *not* discharged when the Party on whom the Burden lies fails to prove or disprove as the case may be.

4. When can a fact be said to be proved or disproved ? And when can it be said to be not proved.

The answer to this question is given in section 3.

NOTE.— Two things must be noted.

(i) Proof does not mean rigid mathematical demonstration.

(ii) Moral conviction is not proof.

Proof means Evidence.

But such evidence as would induce a reasonable man to come to some conclusion.

(1911) I. K. B. 988 (995).

31 Bom. L.R. 516.

The question of proof is one of probability and not of certainty.

Discharge of Burden of Proof and Quantum of Evidence

(I) Under the English Law corroboration is necessary in certain cases:

(1) High Treason—Two witnesses.

(2) Perjury—

(3) Breach of Promise—

(4) Bastard—Mother's testimony must be corroborated.

(II) Under the Indian Law the rule is absolute. The Court may act on the testimony of a single witness even though uncorroborated.

Exception.

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PART V

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WAITING FOR A VISA

** Here are some of the reminiscences drawn by Dr. Ambedkar in his own handwriting. The MSS traced in the collection of the People's Education Society were published by the society as a booklet on 19th March 1990.—ed.*

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WAITING FOR A VISA

Foreigners of course know of the existence of untouchability. But not being next door to it, so to say, they are unable to realize how oppressive it is in its actuality. It is difficult for them to understand how it is possible for a few untouchables to live on the edge of a village consisting of a large number of Hindus, go through the village daily to free it from the most disagreeable of its filth and to carry the errands of all the sundry, collect food at the doors of the Hindus, buy spices and oil at the shops of the Hindu Bania from a distance, regard the village in every way as their home, and yet never touch nor be touched by any one belonging to the village. The problem is how best to give an idea of the way the untouchables are treated by the caste Hindus. A general description or a record of cases of the treatment accorded to them are the two methods by which this purpose could be achieved. I have felt that the latter would be more effective than the former. In choosing these illustrations I have drawn partly upon my experience and partly upon the experience of others. I begin with events that have happened to me in my own life.

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ONE

Our family came originally from Dapoli Taluka of the Ratnagiri District of the Bombay Presidency. From the very commencement of the rule of the East India Company my fore-fathers had left their hereditary occupation for service in the Army of the Company. My father also followed the family tradition and sought service in the Army. He rose to the rank of an officer and was a Subhedar when he retired. On his retirement my father took the family to Dapoli with a view to settling down' there. But for some reasons my father changed his mind. The family left Dapoli for Satara where we lived till 1904. The first incident which I am recording as well as I can remember, occured in about 1901 when we were at Satara. My mother was then dead. My father was away on service as a cashier at a place called Koregaon in Khatav Taluka in the Satara District, where the Government of Bombay had started the work of excavating a Tank for giving employment to famine stricken people who were dying by thousands. When my father went to Koregaon he left me, my brother who was older than myself and two sons of my eldest sister who was dead, in charge of my aunt and some kind neighbours. My aunt was the kindest soul I know, but she was of no help to us. She was somewhat of a dwarf and had some trouble with her legs which made it very difficult for her to move about without the aid of somebody. Often times she had to be lifted. I had sisters. They were married and were away living with their families. Cooking our food became a problem with us especially as our aunty could not on account of her helplessness, manage the job. We four children went to school and we also cooked our food. We could not prepare bread. So we lived on Pulav which we found to be the easiest dish to prepare, requiring nothing more than mixing rice and mutton.

Being a cashier my father could not leave his station to come to Satara to see us, therefore he wrote to us to come to Koregaon and spend our summer vacation with him. We children were thoroughly excited over the prospect especially as none of us had up to that time seen a railway train.

Great preparations were made. New shirts of English make, bright beje welled caps, new shoes, new silk-bordered dhoties were ordered for the journey. My father had given us all particulars regarding our journey and had told us to inform him on which day we were starting so that he would send his peon to the Railway Station to meet us and to take us to Goregaon. According to this arrangement myself, my brother and one of my sister's sons left Satara, our aunt remaining in charge of our neighbours who promised to look after her. The Raiway Station was 10 miles distant from our place and a *tonga* (a one-horse carriage) was engaged to take us to the Station. We were dressed in the new clothing specially made for the occasion and we left our home full of joy but amidst the cries of my aunt who was almost prostrate with grief at our parting.

When we reached the station my brother bought tickets and gave me and my sister's son two annas each as pocket money to be spent at our pleasure. We at once began our career of riotous living and each ordered a bottle of lemonade at the start. After a short while the train whistled in and we boarded it as quickly as we could for fear of being left behind. We were told to detrain at Masur, the nearest railway station for Goregaon.

The train arrived at Masur at about 5 in the evening and we got down with our luggage. In a few minutes all the passengers who had got down from the train had gone away to their destination. We four children remained on the platform looking out for my father or his servant whom he had promised to send. Long did we wait but no one turned up. An hour elapsed and the station-master came to enquire. He asked us for our tickets. We showed them to him. He asked us why we tarried., We told him that we were bound for Goregaon and that we were waiting for father or his servant to come but that neither had turned up and that we did not know how to reach Goregaon. We were well dressed children. From our dress or talk no one could make out that we were children of the untouchables. Indeed the station-master was quite sure we were Brahmin children and was extremely touched at the plight in which he found us. As is usual among the Hindus the staion-master asked us who we were. Without a moment's thought I blurted out that we were Mahars. (Mahar is one of the

communities which are treated as untouchables in the Bombay Presidency). He was stunned. His face underwent a sudden change. We could see that he was overpowered by a strange feeling of repulsion. As soon as he heard my reply he went away to his room and we stood where we were. Fifteen to twenty minutes elapsed; the sun was almost setting. The father had not turned up nor had he sent his servant, and now the station-master had also left us. We were quite bewildered and the joy and happiness which we felt at the beginning of the journey gave way to the feeling of extreme sadness.

After half an hour the station-master returned and asked us what we proposed to do. We said that if we could get a bullock-cart on hire we would go to Goregaon and if it was not very far we would like to start straightway. There were many bullock-cans plying for hire. But my reply to the station-master that we were Mahars had gone round among the cartmen and not one of them was prepared to suffer being polluted and to demean himself carrying passengers of the untouchable classes. We were prepared to pay double the fare but we found that money did not work. The station-master who was negotiating on our behalf stood silent not knowing what to do. Suddenly a thought seemed to have entered his head and he asked us, "Can you drive the can ?" Feeling that he was finding out a solution of our difficulty we shouted, "Yes, we can". With that answer he went and proposed on our behalf that we were to pay the cartman double the fare and drive the cart and that he should walk on foot along with the cart on our journey. One cartman agreed as it gave him an opportunity to earn his fare and also saved him from being polluted.

It was about 6.30 p.m. when we were ready to start. But we were anxious not to leave the station until we were assured that we would reach Goregaon before it was dark. We therefore questioned the cartman as to the distance and the time he would take to reach Goregaon. He assured us that it would be not more than 3 hours. Believing in his word, we put our luggage in the can, thanked the station-master and got into the cart. One of us took the reins and the cart started with the man walking by our side.

Not very far from the station there flowed a river. It was quite dry except at places where there were small pools of water. The

owner of the cart proposed that we should halt there and have our meal as we might not get water on our way. We agreed. He asked us to give a part of his fare to enable him to go to the village and have his meal. My brother gave him some money and he left promising to return soon. We were very hungry and were glad to have had an opportunity to have a bite. My aunty had pressed our neighbours' women folk into service and had got some nice preparation for us to take on our way. We opened tiffin basket and started eating. We needed water to wash things down. One of us went to the pool of water in the river basin nearby. But the water really was no water. It was thick with mud and urine and excreta of the cows and buffaloes and other cattle who went to the pool for drinking. In fact that water was not intended for human use. At any rate the stink of the water was so strong we could not drink it. We had therefore to close our meal before we were satisfied and wait for the arrival of the cartman. He did not come for a long time and all that we could do was to look for him in all directions. Ultimately he came and we started on our journey. For some four or live miles we drove the cart and he walked on foot. Then he suddenly jumped into the cart and took the reins from our hand. We thought this to be rather a strange conduct on the part of a man who had refused to let the cart on hire for fear of pollution to have set aside all his religious scruples and to have consented to sit with us in the same cart but we dared not ask him any questions on the point. We were anxious to reach Koregaon our destination as quickly as possible. And for sometime we were interested in the movement of the cart only. But soon there was darkness all around us. There were no street lights to relieve the darkness. There were no men or women or even cattle passing by to make us feel that we were in their midst. We became fearful of the loneliness which surrounded us. Our anxiety was growing. We mustered all the courage we possessed. We had travelled far from Masur. It was more than three hours. But there was no sign of Koregaon. There arose a strange thought within us. We suspected that the cartman intended treachery and that he was taking us to some lonely spot to kill us. We had lot of gold ornaments on us and that helped to strengthen our suspicion. We started asking him how far

Koregaon was, why we were so late in reaching it. He kept on saying, "It is not very far, we shall soon reach it". It was about 10.00 at night when finding that there was no trace of Koregaon we children started crying and abusing the cartman. Our lamentations and wailings continued for long. The cartman made no reply. Suddenly we saw a light burning at some distance. The cartman said, "Do you see that light ? That is a light of the toll-collector. We will rest there for the night." We felt some relief and stopped crying. The light was distant, but we could never seem to reach it. It took us two hours to reach the toll-collector's hut. The interval increased our anxiety and we kept on asking the cartman all sorts of questions, as to why there was delay in reaching the place, whether we were going on the same road, etc.

Ultimately by mid-night the cart reached the toll-collector's hut. It was situated at the foot of a hill but on the other side of the hill. When we arrived we saw a large number of bullock-carts there all resting for the night. We were extremely hungry and wanted very much to eat. But again there was the question of water. So we asked our driver whether it was possible to get water. He warned us that the toll-collector was a Hindu and that there was no possibility of our getting water if we spoke the truth and said that we were Mahars. He said, "Say you are Mohammedans and try your luck". On his advice I went to the toll-collector's hut and asked him if he would give us some water. "Who are you ?", he inquired. I replied that we were Musalmans. I conversed with him in Urdu which I knew very well so as to leave no doubt that I was a real Musalman. But the trick did not work and his reply was very curt. "Who has kept water for you ? There is water on the hill, if you want to go and get it, I have none." With this he dismissed me. I returned to the cart and conveyed to my brother his reply. I don't know what my brother felt. All that he did was to tell us to lie down.

The bullocks had been unyoked and the cart was placed sloping down on the ground. We spread our beds on the bottom planks inside the cart, and laid down our bodies to rest. Now that we had

come to a place of safety we did not mind what happened. But our minds could not help turning to the latest event. There was plenty of food with us. There was hunger burning within us ; with all this we were to sleep without food; that was because we could get no water and we could get no water because we were untouchables. Such was the last thought that entered our mind. I said, we had come to a place of safety. Evidently my elder brother had his misgivings. He said it was not wise for all four of us to go to sleep. Anything might happen. He suggested that at one time two should sleep and two should keep watch. So we spent the night at the foot of that hill.

Early at 5 in the morning our cartman came and suggested that we should start for Koregaon. We flatly refused. We told him that we would not move until 8 O'clock. We did not want to take any chance. He said nothing. So we left at 8 and reached Koregaon at 11. My father was surprised to see us and said that he had received no intimation of our coming. We protested that we had given intimation. He denied the fact. Subsequently it was discovered that the fault was of my father's servant. He had received our letter but failed to give it to my father.

This incident has a very important place in my life. I was a boy of nine when it happened. But it has left an indelible impression on my mind. Before this incident occured, I knew that I was an untouchable and that untouchables were subjected to certain indignities and discriminations. For instance, I knew that in the school I could not sit in the midst of my class students according to my rank but that I was to sit in a corner by myself. I knew that in the school I was to have a separate piece of gunny cloth for me to squat on in the class room and the servant employed to clean the school would not touch the gunny cloth used by me. I was required to carry the gunny cloth home in the evening and bring it back the next day. While in the school I knew that children of the touchable classes, when they felt thirsty, could go out to the water tap, open it and quench their thirst. All that was necessary was the permission of the teacher. But my position was separate. I could not touch the tap and unless it was opened for it by a touchable person, it was not possible for me to quench

my thirst. In my case the permission of the teacher was not enough. The presence of the school peon was necessary, for, he was the only person whom the class teacher could use for such a purpose. If the peon was not available I had to go without water. The situation can be summed up in the statement—no peon, no water. At home I knew that the work of washing clothes was done by my sisters. Not that there were no washermen in Satara. Not that we could not afford to pay the washermen. Washing was done by my sisters because we were untouchables and no washerman would wash the clothes of an untouchable. The work of cutting the hair or shaving the boys including myself was done by our elder sister who had become quite an expert barber by practising the art on us, not that there were no barbers in Satara, not that we could not afford to pay the barber. The work of shaving and hair cutting was done by my sister because we were untouchables and no barber would consent to shave an untouchable. All this I knew. But this incident gave me a shock such as I never received before, and it made me think about untouchability which, before this incident happened, was with me a matter of course as it is with many touchables as well as the untouchables.

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TWO

In 1916 I returned to India. I had been sent to America by His Highness the Maharaja of Baroda for higher education. I studied at Columbia University in New York from 1913 to 1917. In 1917 I came to London and joined the post-graduate department of the School of Economics of the University of London. In 1918 I was obliged to return to India without completting my studies. As I was educated by the Baroda State I was bound to serve the State. Accordingly on my arrival I straightway went to Baroda. The reasons why I left Baroda service are quite irrelevant to my present purpose. I do not therefore wish to enter into them. I am only concerned with my social experiences in Baroda and I will confine myself to describing them.

My five years of stay in Europe and America had completely wiped out of my mind any consciousness that I was an untouchable and that an untouchable whenever he went in India was a problem to himself and to others. But when I came out of the station my mind was considerably disturbed by a question, "Where to go ? Who will take me ?" I felt deeply agitated. Hindu hotels, called Vishis, I knew, there were. They would not take me. The only way of seeking accommodation therein was by impersonation. But I was not prepared for it because I could well anticipate the dire consequences which were sure to follow if my identity was discovered as it was sure to be. I had friends in Baroda who had come to America for study. "Would they welcome me if I went ?" I could not assure myself. They may feel embrassed by admitting an untouchable in their household. I stood under the roof of the station for sometime thinking, where to go, what to do. It then struck me to enquire if there was any place in the camp. All passengers had by this time gone. I alone was left. Some hackney drivers who had failed to pick up any traffic were watching and waiting for me. I called one of them and asked him if he knew if there was a hotel in the camp. He said that there was a Parsi inn and that they took paying guests. Hearing that it was an inn maintained by the Parsis my heart was gladdened. The

Parsis are followers of the Zoroastrian religion. There was no fear of my being treated by them as an untouchable because their religion does not recognize untouchability. With a heart glad with hope and a mind free from fear I put my luggage in a hackney carriage and asked the driver to drive me to Parsi inn in the camp.

The inn was a two storied building on the ground floor of which lived an old Parsi with his family. He was a caretaker and supplied food to tourists who came there to stay. The carriage arrived and the Parsi caretaker showed me upstairs. I went up while the carriage driver brought up my luggage. I paid him and he went away. I felt happy that after all I had solved my problem of finding a sojourn. I was undressing as I wanted to be at ease. In the meantime the caretaker came with a book in his hand. Seeing as he could well see from my half undressed state that I had no Sadra and Kasti, the two things which prove that one is a Parsi, in a sharp tone he asked me, who I was. Not knowing that this inn was maintained by the Parsi community for the use of Parsis only, I told him that I was a Hindu. He was shocked, and told me that I could not stay in the inn. I was thoroughly shocked by his answer and was cold all over. The question returned again where to go ? Composing myself I told him that though a Hindu I had no objection to staying there if he had no objection. He replied, "How can you ? I have to maintain a register of all those who stay here in the inn." I saw his difficulty. I said I could assume a Parsi name for the purpose of entering it in the register. "Why do you object if I do not object, you will not lose, you will earn something if I stay here." I could see that he was inclined favourably. Evidently he had had no tourist for a long time and he did not like to forego the opportunity of making a little money. He agreed on condition that I pay him a rupee and a half per day for board and lodging and entered myself as a Parsi in his register. He went downstairs and I heaved a sigh of relief. The problem was solved and I felt very happy. But alas ! I did not then know how short was to be this happiness. But before I describe the tragic end of my stay in this inn I must describe how I passed my time during the short period I lived therein.

The inn on the first floor had a small bed-room and adjoining it was one small bath room with a water tap in it. The rest was one big hall. At the time of my stay the big hall was filled up with all sorts of rubbish, planks, benches, broken chairs, etc. In the midst of the surroundings I lived a single solitary individual. The caretaker came up in the morning with a cup of tea. He came again at about 9.30 with my breakfast or morning meal. A third time he came up at about 8.30 in the evening with my dinner. The caretaker came up only when he could not avoid it and on these occasions he never stayed to talk to me. The day was spent somehow.

I was appointed a probationer in the Accountant General's Office by the Maharaja of Baroda. I used to leave the inn at about 10 a.m. for the office and return late at about 8 in the evening contriving to while away outside the inn as much time in company of friends as I could. The idea of returning to the inn to spend the night therein was most terrifying to me and I used to return to the inn only because I had no other place under the sky to go for rest. In this big hall on the first floor of the inn there were no fellow human beings to talk to. I was quite alone. The whole hall was enveloped in complete darkness. There were no electric lights nor even oil lamps to relieve the darkness. The caretaker used to bring up for my use a small hurricane lamp. Its light could not extend beyond a few inches. I felt that I was in a dungeon and I longed for the company of some human being to talk to. But there was none. In the absence of the company of human beings I sought the company of books and read and read. Absorbed in reading I forgot my lonely condition. But the chirping and flying about of the bats, which had made the hall their home, often distracted my mind and sent cold shivers through me reminding me of what I was endeavouring to forget, that I was in a strange place under strange conditions. Many a time I must have been angry. But I subdued my grief and my anger by the feeling that though it was a dungeon, it was a shelter and that some shelter was better than no shelter. So heart-rending was my condition that when my sister's son came from Bombay bringing my remaining luggage which I had left behind and when he saw my

state, began to cry so loudly that I had to send him back immediately. In this state I lived in the Parsi inn impersonating a Parsi. I knew that I could not long continue this impersonation as I would be discovered some day. I was therefore trying to get a State bungalow to stay in. But the Prime Minister did not look upon my request with the same urgency. My petition went from officer to officer and before I got the final reply the day of my doom arrived.

It was 11th day of my stay in the inn. I had taken my morning meal and had dressed up and was about to step out of my room to go to office. As I was picking up some books which I had borrowed overnight for returning them to the library I heard footsteps of a considerable number of people coming up the staircase. I thought they were tourists who had come to stay and was therefore looking out to see who these friends were. Instantly I saw a dozen angry looking, tall, sturdy Parsis, each armed with a stick, coming towards my room. I realised that they were not fellow tourists and they gave proof of it immediately. They lined up in front of my room and fired a volley of questions. "Who are you ? Why did you come here ? How dare you take a parsi name ? You scoundrel! You have polluted the Parsi inn ! "I stood silent. I could give no answer. I could not persist in impersonation. It was in fact a fraud and the fraud was discovered, and I am sure if I had persisted in the game I was playing I would have been assaulted by the mob of angry and fanatic Parsis and probably doomed to death. My meekness and my silence averted this doom. One of them asked when I thought of vacating. At that time my shelter I prized more than my life. The threat implied in this question was a grave one. I therefore broke my silence and implored them to let me stay for a week at least, thinking that my application to the Minister for a bungalow would be decided upon favourably in the meantime. But the Parsis were in no mood to listen. They issued an ultimatum. They must not find me in the inn in the evening. I must pack off. They held out dire consequences and left. I was bewildered. My heart sank within me. I cursed all and wept bitterly. After all I was deprived of my precious possession—namely my shelter. It was no better than a prisoners's cell. But it was to me very precious.

After the Parsis were gone I sat for some time engaged in thinking to find a way out. I had hopes that I would soon get a State bungalow and my troubles would be over. My problem was therefore a temporary problem and I thought that going to friends would be a good solution. I had no friends among the untouchables of Baroda State. But I had friends among other classes. One was a Hindu, the other was an Indian Christian. I first went to my Hindu friend and told him what had befallen me. He was a noble soul and a great personal friend of mine. He was sad and also indignant. He, however, let fall one observation. He said, "If you come to my home my servants will go". I took the hint and did not press him to accommodate me. I did not like to go to the Indian Christian friend. Once he had invited me to go and stay with him. But I had declined preferring to stay in the Parsi inn. My reason was that his habits were not congenial to me. To go now would be to invite a rebuff. So I went to my office but I could not really give up this chance of finding a shelter. On consulting a friend I decided to go to him and ask him if he would accommodate me. When I put the question his reply was that his wife was coming to Baroda the next day and that he would have to consult her. I learnt subsequently that it was a very diplomatic answer. He and his wife came originally from a family which was Brahmin by caste and although on conversion to Christianity the husband had become liberal in thought, the wife had remained orthodox in her ways and would not have consented to harbour an untouchable in her house. The last ray of hope thus flickered away. It was 4 p.m. when I left the house of my Indian Christian friend. Where to go was the one supreme question before me. I must quit the inn and had no friend to go to ! ! The only alternative left was to return to Bombay.

The train to Bombay left Baroda at 9 p.m. There were five hours to be spent. Where to spend them ? Should I go to the inn ? Should I go to my friend ? I could not buck up sufficient courage to go back to the inn. I feared the Parsis might come and attack me. I did not like to go to my friend. Though my condition was pitiable I did not like to be pitied. I decided to spend the five hours in the public garden which is called Kamathi Baug, on the border of the city and the camp. I sat there partly

with a vacant mind, partly with sorrow at the thought of what had happened to me, and thought of my father and mother as children do when they are in a forlorn condition. At 8 p.m. I came out of the garden, took a carriage to the inn, brought down my luggage. The caretaker came out but neither he nor I could utter a word to each other. He felt that he was in some way responsible for bringing him into trouble. I paid him his bill. He received it in silence and I took his leave in silence. I had gone to Baroda with high hope. I had given up many offers. It was war time. Many places in the Indian Educational service were vacant. I knew very influential people in London. But I did not seek any of them. I felt that my duty was to offer my services first to the Maharaja of Baroda who had financed my education. And here I was driven to leave Baroda and return to Bombay after a stay of only eleven days.

This scene of a dozen Parsis armed with sticks lined before me in a menacing mood and myself standing before them with a terrified look imploring for mercy is a scene which so long a period as 18 years has not succeeded in fading away. I can even now vividly recall it and never recall it without: tears in my eyes. It was then for the first time that I learnt that a person who is an unouchable to a Hindu is also an untouchable to a Parsi.

THREE

The year was 1929. The Bombay Government had appointed a Committee to investigate the grievances of the untouchables. I was appointed a member of the Committee. The Committee had to tour all over the province to investigate into the allegations of injustice, oppression and tyranny. The Committee split up. I and another member were assigned the two districts of Khandesh. My colleague and myself after finishing our work parted company. He went to see some Hindu saint. I left by train to go to Bombay. At Chalisgaon I got down to go to a village on the Dhulia line to investigate a case of social boycott which had been declared by the caste Hindus against the untouchables of that village. The untouchables of Chalisgaon came to the station and requested me to stay for the night with them. My original plan was to go straight to Bombay after investigating the case of social boycott. But as they were keen I agreed to stay overnight. I boarded the train for Dhulia to go to the village, went there and informed myself of the situation prevailing in the village and returned by the next train to Chalisgaon.

I found the untouchables of Chalisgaon waiting for me at the station. I was garlanded. The Maharwada, the quarters of the untouchables, is about 2 miles from the Railway station and one has to cross a river on which there is a culvert to reach it. There were many horse carnages at the station plying for hire. The Maharwada was also within walking distance from the station. I expected immediately to be taken to the Maharwada. But there was no movement in that direction and I could not understand why I was kept waiting. After an hour or so a *tonga* (one horse carriage) was brought close to the platform and I got in. The driver and I were the only two occupants of the *tonga*. Others went on foot by a short cut. The *tonga* had not gone 200 paces when there would have been a collision with a motor car. I was surprised that the driver who was paid for hire every day should have been so inexperienced. The accident was averted only

because on the laud shout of the policeman the driver of the car pulled it back.

We some how came to the culvert on the river. On it there are no walls as there are on a bridge. There is only a row of stones fixed at a distance of five or ten feet. It is paved with stones. The culvert on the river is at right angles to the road we were coming by. A sharp turn has to be taken to come to the culvert from the road. Near the very first side stone of the culvert the horse instead of going straight took a turn and bolted. The wheel of the *tonga* struck against the side stone so forcibly that I was bodily lifted up and thrown down on the stone pavement of the culvert and the horse and the carriage fell down from the culvert into the river. So heavy was the fall that I lay down senseless. The Maharwada is just on the other bank of the river. The men who had come to greet me at the station had reached there ahead of me. I was lifted and taken to the Maharwada amidst the cries and lamentations of the men, women and children. As a result of this I received several injuries. My leg was fractured and I was disabled for several days. I could not understand how all this happened. The *tongas* pass and repass the culvert every day and never has a driver failed to take the tonga safely over the culvert.

On enquiry I was told the real facts. The delay at the railway station was due to the fact that the tongawalas were not prepared to drive the tonga with a passenger who was an untouchable. It was beneath their dignity. The Mahars could not tolerate that I should walk to their quarters. It was not in keeping with their sense of my dignity. A compromise was therefore arrived at. That compromise was to this effect: the owner of the tonga would give the tonga on hire but not drive. The Mahars may take the *tonga* but find some one to drive it. The Mahars thought this to be a happy solution. But they evidently forgot that the safety of the passenger was more important than the maintenance of his dignity. If they had thought of this they would have considered whether they could get a driver who could safely conduct me to my destination. As a matter of fact none of them could drive because it was not their trade. They therefore asked someone from amongst themselves to drive. The man took the reins in his

hand and started thinking there was nothing in it. But as he got on he felt his responsibility and became so nervous that he gave up all attempt to control. To save my dignity the Mahars of Chalisgaon had put my very life in jeopardy. It is then I learnt that a Hindu *tongawalla,* no better than a menial, has a dignity by which he can look upon himself as a person who is superior to all untouchables even though he may be a Barristar-at-law.

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FOUR

In the year 1934, some of my co-workers in the movement of the depressed classes expressed a desire to go on a sight-seeing tour if I agreed to join them. I agreed. It was decided that our plan should at all events include a visit to the Buddhist caves at Verul. It was arranged that I should go to Nasik and the party should join me at Nasik. To go to Verul we had to go to Aurangabad. Aurangabad is a town in the Mohammedan State of Hyderabad and is included in the dominion of His Exalted Highness, the Nizam. On the way to Aurangabad we had first to pass another town called Daulatabad which is also in the Hyderabad State. Daulatabad is a historical place and was, at one time, the capital of a famous Hindu King by name Ramdeo Rai. The fort of Daulatabad is an ancient historical monument and no tourist while in that vicinity should omit a visit to it. Accordingly our party had also included in its programme a visit to the fort of Daulatabad.

We hired some buses and touring cars. We were about 30 in number. We started from Nasik to Yeola as Yeola is on the way to Aurangabad. Our tour programme had not been announced and quite deliberately. We wanted to travel incognito in order to avoid difficulties which an untouchable tourist has to face in outlying parts of the country. We had informed our people at those centres only at which we had decided to halt. Accordingly, on the-way although we passed many villages in the Nizam State none of our people had come to meet us. It was naturally different at Daulatabad. There our people had been informed that we were coming. They were waiting for us and had gathered at the entrance to the town. They asked us to get down and have tea and refreshment first and then to go to see the fort. We did not agree to their proposal. We wanted tea very badly but we wanted sufficient time to see the fort before it was dusk. We therefore left for the fort and told our people that we would take tea on our return. Accordingly we told our drivers to move on and within a few minutes we were at the gate of the fort.

The month was Ramjan, the month of fast for the Mohammedans. Just outside the gate of the fort there is a small tank of water full to brim. There is all around a wide stone pavement. Our faces, bodies and clothes were full of dust gathered in the course of our journey and we all wished to have a wash. Without much thought some members of the party washed their faces and their legs on the pavement with the water from the tank. After these ablutions we went to the gate of the fort. There were armed soldiers inside. They opened the big gates and admitted us into the archway. We had just commenced asking the guard the procedure for obtaining permission to go into the fort. In the meantime an old Mohammedan with white flowing beard was coming from behind shouting "the Dheds (meaning untouchables) have polluted the tank". Soon all the young and old Mohammedans who were near about joined him and all started abusing us. "The Dheds have become arrogant. The Dheds have forgotten their religion (i.e. to remain low and degraded). The Dheds must be taught a lesson". They assumed a most menacing mood. We told them that we were outsiders and did not know the local custom. They turned the fire of their wrath against the local untouchables who by that time had arrived at the gate. "Why did you not tell these outsiders that this tank could not be used by untouchables !" was the question they kept on asking them. Poor people ! They were not there when we entered tank. It was really our mistake because we acted without inquiry. They protested that it was not their fault. But the Mohammedans were not prepared to listen to my explanation. They kept on abusing them and us. The abuse was so vulgar that it had exasperated us. There could easily have been a riot and possibly murders. We had however to restrain ourselves. We did not want to be involved in a criminal case which would bring our tour to an abrupt end.

One young muslim in the crowd kept on saying that every one must conform to his religion, meaning thereby that the untouchables must not take water from a public tank. I had grown quite impatient and asked him in a some what angry tone, "Is that what your religion teaches ? Would you prevent an untouchable from taking water from this tank if he became a Mohammedan ?" These straight questions seemed to have

some effect on the Mohammedans. They gave no answer and stood silent. Turning to the guard I said, again in an angry tone, "Can we get into the fort or not ? Tell us, if we can't we don't want to stop". The guard asked for my name. I wrote it out on a piece of paper. He took it to the Superintendent inside and came out. We were told that we could go into the fort but we could not touch water anywhere in the fort and an armed soldier was ordered to go with us to see that we did not transgress the order.

I gave one instance to show that a person who is an untouchable to a Hindu is also an untouchable to a Parsi. This will show that person who is an untouchable to a Hindu is also an untouchable to a Mohammedan.

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FIVE

The next case is equally illuminating. It is a case of an Untouchable school teacher in a village in Kathiawar and is reported in the following letter which appeared in the '**Young India'** a journal published by Mr. Gandhi in its issue of 12th December 1929. It expresses the difficulties he had expressed in persuading a Hindu doctor to attend to his wife who had just delivered and how the wife and child died for want of medical attention. The letter says:

> "On the 5th of this month a child was born to me. On the 7th, she fell ill and suffered from loose stools. Her vitality seemed to ebb away and her chest became inflamed. Her breathing became difficult and there was acute pain in the ribs, I went to call a doctor—but he said he would not go to the house of a Harijan nor was he prepared to examine the child. Then I went to Nagarseth and Garasia Darbar and pleaded them to help me. The Nagarseth stood surety to the doctor for my paying his fee of two rupees. Then the doctor came but on condition that he would examine them only outside the Harijan colony. I took my wife out of the colony along with her newly born child. Then the doctor gave his thermometer to a Muslim, he gave it to me and I gave it to my wife and then returned it by the same process after it had been applied. It was about eight o'clock in the evening and the doctor on looking at the thermometer in the light of a lamp said that the patient was suffering from pneumonia. Then the doctor went away and sent the medicine. I brought some linseed from the bazar and used it on the patient. The doctor refused to sec her later, although I gave the two rupees fee. The disease is dangerous and God alone will help us.
>
> The lamp of my life has died out. She passed away at about two o'clock this afternoon."

The name of the Untouchable school teacher is not given. So also the name of the doctor is not mentioned. This was at the request of the Untouchable teacher who feared reprisals. The facts are indisputable.

No explanation is necessary. The doctor, who inspite of being educated refused to apply the thermometer and treat an ailing woman in a critical condition. As a result of his refusal to treat her, the woman died. He felt no qualms of conscience in setting aside the code of conduct which is binding on his profession. The Hindu would prefer to be inhuman rather than touch an Untouchable.

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SIX

There is one other incident more telling than this. On the 6th of March 1938, a meeting of the Bhangis was held at Kasarwadi (behind Woollen Mills) Dadar, Bombay, under the Chairmanship of Mr. Indulal Yadnik. In this meeting, one Bhangi boy narrated his experience in the following terms:

"I passed the Vernacular Final Examination in 1933. I have studied English up to the 4th Standard. I applied to the Schools Committee of the Bombay Municipality for employment as a teacher but I failed as there was no vacancy. Then, I applied to the Backward Classes Officer, Ahemadabad, for the job of a Talati (village Patwari) and I succeeded. On 19th February 1936, I was appointed a Talati in the office of the Mamlatdar of the Borsad Taluka in the Kheda District.

Although my family originally came from Gujarat, I had never been in Gujarat before. This was my first occasion logo there. Similarly, I did not know that untouchability would be observed in Government Offices. Besides in my application the facts of my being a Harijan was mentioned and so I expected that my colleagues in the office would know before-hand who I was. That being so, I was surprised to find the attitude of the clerk of the Mamlatdar's office when I presented myself to take charge of the post of the Talati.

The Karkun contemptuously asked, "Who are you ?" I replied, "Sir, lam a Harijan". "He said," Go away, stand at a distance. How dare you stand so near me. You are in office, if you were outside I would have given you six kicks, what audacity to come here for service ? "Thereafter, he asked me to drop on the ground my certificate and the order of appointment as a Talati. He then picked them up. While I was working in the Mamlatdar's office at Borsad I experienced great difficulty in the matter of getting water for drinking. In the verandah of the office there were kept cans containing drinking water. There was a waterman incharge of these water cans. His duty was to pour out water to clerks in office whenever they needed it. In the absence of the waterman they could themselves take water out of the cans and drink it. That was impossible in my case. I could not touch the cans for my touch would pollute the water, I had therefore to depend upon the mercy of the waterman. For my use there was kept a small rusty pot. No one would touch it or wash it except myself. It was in this pot that the waterman would dole out water to mc. But I could get water only if the waterman was present. This

waterman did not like the idea of supplying me with water. Seeing that I was coming for water he would manage to slip away with the result that I had to go without water and the days on which I had no water to drink were by no means few.

I had the same difficulties regarding my residence. I was a stranger in Borsad. No caste Hindu would rent a house to me. The Untouchables of Borsad were not ready to give me lodgings for the fear of displeasing the Hindus who did not like my attempt to live as a clerk, a station above me. Far greater difficulties were with regard to food. There was no place or person from where I could get my meals. I used to buy 'Bhajhas 'morning and evening, eat them in some solitary place outside the village and come and sleep at night, on the pavement of the verandahs of the Mamlatdar's office. In this way, I passed four days. All this became unbearable to me. Then I went to live at Jentral, my ancestral village. It was six miles from Borsad. Every day I had to walk eleven miles. This I did for a month and a half.

There after the Mamlatdar sent me to a Talati to learn the work. This Talati was in charge of three villages, Jentral, Khapur and Saijpur. Jentral was his headquarters. I was in Jentral with this Talati for two months. He taught me nothing and I never once entered the village office. The headman of the village was particularly hostile. Once he had said,' you fellow, your father, your brother are sweepers who sweep the village office and you want to sit in the office as our equal ? Take care, better give up this job.'

One day the Talati called me to Saijpur to prepare the population table of the village. From Jentral I went to Saijpur, I found the Headman and the Talati in the villege office doing some work. I went, stood near the door of the office and wished them 'good morning' but they look no notice of me. I stood outside for about 15 minutes. I was already tired of life and felt enraged at being thus ignored and insulted. I sat down on a chair that was lying there. Seeing me seated on the chair the Headman and the Talati quietly went away without saying anything to me. A short while after, people began to come and soon a large crowd gathered round me. This crowd was led by the Librarian of the village library. I could not understand why an educated person should have led this mob. I subsequently learnt that the chair was his. He started abusing me in the worst terms. Addressing the Ravania (village servant) he said, 'Who allowed this dirty dog of a Bhangi to sit on the chair ?' The Ravania

unseated me and took away the chair from me. I sat on the ground. Thereupon the crowd entered the village office and sun-rounded me. It was a furious crowd raging with anger, some abusing me, some threatening to cut me to pieces with Dharya (a sharp weapon like the sword). I implored them to excuse me and to have mercy upon me. That did not have any effect upon the crowd. I did not know how to save myself. But an idea came to me of writing to the Mamlatdar about the fate that had befallen me and telling him how to dispose of my body in case I was killed by the crowd. Incidentally, it was my hope that if the crowd came to know that I was practically reporting against them to the Mamlatdar they might hold their hands. I asked the Ravania to give me a piece of paper which he did. Then with my fountain pen I wrote the following on it in big bold letters so that everybody could read it:

"To,

The Mamlatdar, Taluka Borsad.

Sir,

Be pleased to accept the humble salutations of Parmar Kalidas Shivram. This is to humbly inform you that the hand of death is falling upon me today. It would not have been so if I had listened to the words of my parents. Be so good as to inform my parents of my death."

The Librarian read what I wrote and at once asked me to tear it off, which I did. They showered upon me innumerable insults. 'You want us to address you as our Talati ? You are a Bhangi and you want to enter the office and sit on the chair ?' I implored for mercy and promised not to repeat this and also promised to give up the job. I was kept there till seven in the evning when the crowd left. Till then the Talati and the Mukhiya had not come. Thereafter I took fifteen days' leave and returned to my parents in Bombay."

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PART VI
MISCELLANEOUS NOTES

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PART VI

MISCELLANEOUS NOTES

1. The Constitution of British India.
2. Notes on Parliamentary Procedure.
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THE CONSTITUTION OF BRITISH INDIA

I. Introductory : Limits of the Subject.

The Constitution of British India is contained in an enactment called the Government of India Act, 1919. A student of the Constitution of India therefore has not to search for the constitution as the student of the English Constitution has to do. His position is very much like the position of the student of the American Constitution, whose problem is nothing more than to understand and to interpret the statute embodying the Constitution of the United States. From this point of view it would seem unnecessary to raise the question what is Constitutional Law and what are the questions that usually fall within its scope. Secondly assuming that it is necessary to define the limits of the subject of Constitutional Law the question is whether such an inquiry should form a preliminary to the discussion of the subject or whether it should form a concluding part of it. The late Professor Maitland in his Study of the English Constitutional History adopted the latter course. And there is a great deal to be said in favour of such a course. There are reasons however why such a course would not be suitable to the study of the Indian Constitution.

The reasons why the question what is Constitutional Law must be raised at the outset, so that we could be clear as to the limits of our subject and the topics that must fall within it will be obvious from one or two illustrations. The Government of India Act does not say anything about the Writ of Habeas Corpus or the Writ of Mandamus or Certiorari. It does not speak of Martial Law or Administrative Law. It does not speak of the right of Paramountcy, what the Government of India undoubtedly exercises in respect of their dealings with the Indian States. Is it necessary to study these questions or is it not ? Are they proper subject to the study of the Indian Constitutional Law or are they not ? Judging by the tests of how these subjects have been dealt with in

other countries by authorities who have studied the Constitutional Law of these countries there can be no doubt that by common consent all these matters are treated as pertaining to the domain of constitutional law. If therefore these subjects which do not find a place in the Government of India Act but which all the same must form a part of the study of Constitutional Law, the question of the definition of the subject becomes important.

To the question, what is Constitutional Law, different people have given different answers. One may take Austin and Maitland as types representing two schools of thought. Austin subdivides Public Law or what he calls the Law of Political Conditions into two classes, Constitutional Law and Administrative Law. According to him Constitutional Law determines the persons or the classes of persons who shall bear the sovereign power in the State. He defines the mode in which these persons shall share those powers. Austin's definition of Constitutional Law as is obvious includes only those rules which determine the constitution and composition of the sovereign body. He excludes from the Constitutional Law all rules which deal with the **exercise of the sovereignty** by the sovereign body. While Austin makes the definition of the Constitutional Law depend upon the logic of his principles, Maitland makes the limits of Constitutional Law a matter of conscience. To Maitland, Constitutional Law includes not only the rules which determine the rules of the composition of the sovereign body, but it would also include the Privy Council, the Departments of the State, the Secretaries of the State, Judges, Justices of the Peace, Poor Law Guardians, Boards of Health and Policemen. These views represent the two extremes and if Austin's is too narrow, Maitland's undoubtedly is too wide.

There is however a middle position which can be founded upon the views of Prof. Holland—expressed in his Jurisprudence. A right is a capacity residing in one person of controlling, with the assent and assistance of the State, the actions of another. Rights which may be conferred by one citizen against another constitute the subject matter of Private Law. The rights which the State claims to itself against the subjects and the rights which it permits against itself constitute Public Law.

Constitutional Law is undoubtedly part of Public Law and as far as it is so it must discuss the rights of the State against the subjects and the rights of the subjects against the State. But Constitutional Law include more than this. It must include the study of the organization of the state for the State is an artificial person which claims the right to punish, to possess property, to make contracts and to regulate its rights and duties as between itself and the subjects and also as between the subjects themselves. It is necessary to inquire how this artificial person is constituted. The study of the Constitutional Law therefore must include the study of three matters: (1) The organization of the State, (2) The rights of the State against the subjects and (3) The rights of the subjects against the State. It is this view of the limits and scope of the Constitutional Law that I propose to follow in these lectures on the Government of India Act and it is the view adopted by Prof. Anson in his Study of the English Constitution.

There is another question which is bound to crop up and which has better be disposed of at the outset. Is the treatment of the subject to be historical or to be descriptive ? Some history cannot be avoided in the study of the Government of India Act. The Government of India Act says that all remedies that were available against the East India Company shall continue to be available against the Secretary of State. The Government of India Act also says that His Majesty may establish High Courts by Letters Patent. The Letters Patent say that the High Court shall exercise all the powers of the Supreme Court which they superseded. Many other Sections of similar character in the Government of India Act could be referred to. But the two mentioned are sufficient to illustrate that history cannot be avoided. For, in dealing with the Constitution of India, to understand the remedies available against the Secretary of State one must inquire what were the remedies open to a subject against the East India Company. Nor can one understand the powers of the High Court until one enquires what were the powers with which the Supreme Court was invested. Although some history would be necessary, there can be no justification in a study of the Constitutional Law as it operates today

to study every part of it historically. All past is of no moment to the present. Only the part of the present need be adverted to, and that is what I propose to do when any particular question requires historical treatment for its proper understanding.

[We have not received any other essay on this subject—ed.]

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NOTES ON PARLIAMENTARY PROCEDURE

Forms of Procedure are determined by functions of a body. The important functions of a Parliamentary Body are :

(1) Power to express an opinion on and criticize any executive action.

(2) Power to have Laws.

(3) Power to provide money for carrying on the administration.

I. Power to express an opinion on or criticize any action taken by the Executive. Rules of Business permit:

1. to ask Questions.

2. to move Resolutions.

3. to move an adjournment of the House.

4. to move a motion of want of confidence in the Government.

(1) **Power to ask Questions.**

Rule 7

This is subject to the following restrictions.

Arrangement of Business

I. Order of precedence.

1. Questions 1 hour : 1/2 hour during voting of demands.

2. Bills.

3. Motions to amend Standing Orders.

4. Resolutions.

President may give priority to any item.

II. Priority with regard to Bills, Motions and Resolutions.

(i) Bills and Motions

The most advanced have priority over the less advanced.

(ii) Resolutions

Priority is determined by Ballot.

Quorum

25 members in Bombay.

President shall adjourn to next day if there is no Quorum.

Rule 27. The Budget is dealt with in two stages.

(i) a general discussion ; and

(ii) the voting of demands for grants.

Governor may allot as many days as he likes for general discussion.

No motion is to be made Nor the Budget to be submitted to the vote of the Council when the General discussion is going on.

Rule 29. Voting of Grants.

Not more than twelve days shall be allotted by the Governor for the voting of the demands. Not more than 2 days for any demand. On the last appointed day the President shall forthwith put every Question necessary to dispose of all outstanding matters in connection with the demands for grants.

Rule 30.

No motion for appropriation can be made except on the recommendation of the Governor communicated to the Council. Motions may be moved to reduce any grant or to omit or reduce any item in a grant, but not to increase or alter the destination of the grant.

Rule 31. Excess Grants

(Left blank by the author—ed.)

Rule 32. Supplementary or additional grant.

When the amount falls short

When need arises of provision of new source.

Public Accounts Committee

Rule 33. Constitution of Public Accounts Committee.

(Left blank by the author—ed.)

Rule 34. Duties of the Public Accounts Committee :

(1) To satisfy itself that money is spent within the scope of the demand and to bring to the notice.

Conduct of Business

This is regulated by the Standing Orders.

I. Council Session

1. The Council can meet only at a time or place apppointed by the Governor by notification.

2. Session is prorogued by the order of the Governor.

3. The Council shall sit on such days and at such times as the President shall direct.

Effect of Prorogation

On prorogation all pending notices shall lapse and fresh notices must be given for the next Session except in the following cases :

(1) Question (2) Statutory motions (3) Bills introduced (4) Motion to amend Standing Orders which have been referred to a Select Committee.	These are carried over to the list of Business for the next Session.

Procedure

With regard to

I. Question

Shall be put and answers given in such manner as the President may, in his discretion, determine.

II. **Motion for Adjournment**

30 members to rise

4 O'clock for the purpose of discussing the motion. Debate shall terminate at 6 p.m. and thereafter no question respecting the motion shall be put.

III. Bills

(1) Four Stages

1. Introduction. Asking the leave of the House.
2. First Reading
3. Second Reading
4. Third Reading

(1) Constitution of Australia. Sec. 49.

(2) Constitution of Canada. Sec. 18.

(3) Constitution of South Africa. Sec. 57.

There is no Section in the Government of India Act which gives any privilege to the Legislature.

The Government of India Act confers only two privileges upon members of the Legislature.

I. Freedom of Speech.

Sep. 67(7).

> There shall be freedom of speech in both chambers of the Indian Legislature. No person shall be liable to any proceedings in any Court by reason of his speech or vote in either chamber or by anything contained in any **official** report of the proceedings of either chamber.

Sec. 72 D (7).

> There shall be freedom of speech in the Governor's Legislative Council. No person shall be liable to any proceedings in any Court by reason of his speech or vote in any such Council, or by reason of anything contained in any **official** report of the proceedings of any such Council.

This privilege of Freedom of Speech is subject to two restrictions.

(1) Standing orders.

(2) Official report.

II. Freedom from Arrest.

This privilege is not granted by the Government of India Act. It is granted by an Act of the Indian Legislature. It is called

Legislative Members Exemption Act, 1925. [No. 23 of 1925]

UNDER THIS ACT

1. Members of the legislative bodies constituted under the Government of India Act are exempt from liability to serve as jurors or assessors.

2. No person is liable to arrest or detention in prison under civil process—

(a) If he is a member of a legislative body constituted under the Government of India Act, during the continuance of any meeting of such body.

(b) If he is a member of any Committee of such body, during the continuance of any meeting of such body.

(c) If he is a member of either chamber of Indian Legislature, during the continuance of a joint sitting of the chambers, or of a meeting of a conference or joint Committee of the chambers of which he is a member, and during 14 days before and after such meeting or sitting.

Points to note.

(1) Freedom is only from Civil Arrest.

(2) Liable to re-arrest after the period.

Procedure of the Legislatures

I. The Procedure of the Indian Legislature is regulated by

(1) Rules of Business and

(2) Standing Orders.

Section 67 (1) Section 67 (6)	permit Rules and Standing Orders to be made for the Central Legislature.

Section 72 D (6) Section 72 D (7)	permit Rules and Standing Orders to be made for the Local Legislature.

II. Legislatures have no authority to make rules and standing orders.—

The Dominions have it.

In India the matter is governed by Section 129A.

Governor General in Council to make rules and Standing Orders.

Difference between Standing Orders and Rules

1. Rules are not subject to alteration or repeal by the Indian Legislature, Local or Central.

2. Subject to certain conditions Standing Orders may be amended.

Different purposes of Rules and Standing Orders

Two Questions:

1. What matters a Legislature can discuss and what is within its competence and what is not ?

2. Assuming any particular matter is within its competence, How is that matter to be discussed ? How is it to be brought to an issue ? In what order are members to speak ? Has anybody priority in speaking ? How are votes recorded ? How are they counted ? How are they valued.

The first Question is settled by the Rules of Business. The second is settled by the standing orders. To use the language of the Act:

Rules of Business Regulate the **Course of business.**

Standing Orders regulate the **Conduct of business.**

Rules of Business and Freedom of Action

Do the Rules of Business give the Legislators the necessary freedom to discharge their functions ?

* **Rule 8.**—A Question may be asked for the purpose of obtaining information on a matter of public concern within the special cognizance of the member to whom it is addressed.

Period of Notice.

(a) The President may disallow a question if it does relate to a matter which is not primarily the concern of the Local Government.

(b) A Question which is allowed by the President may be disallowd by the Governor if it relates to

(i) any matter affecting the relations of H. M's Government or of the Government of India, or of the Governor or the Governor in Council, with any foreign State.

(ii) any matter affecting the relations of any of the foregoing authorities with any Prince or Chief under the suzerainty of His Majesty, or relating to the affairs of any such Prince or Chief or to the administration of the territory of any such Prince or Chief.

(iii) any matter which is under adjudication by a Court of Law having jurisdiction in any part of His Majesty's Dominions.

N. B.—If any doubt arises the Governor shall decide the point and his decision shall be final.

(c) In a controversy between the Governor General in Council or the Secretary of State and Local Government no question shall be asked except as to matters of fact, and the answer shall be confined to a statement of fact.

(ii) Right to move Resolutions.

Rules 22-23.

Rule 23. (1) Every resolution shall be in the form of a specific recommendation addressed to the Government.

Statutory Restrictions

Resolution cannot be moved regarding a matter relating to which a question cannot be asked.

Rule 22. Apart from the Statutory restrictions on the right to move resolutions, the Governor has the power **within the period of notice** to disallow any resolution, on the ground that it cannot be moved without detriment to the public interest or on the ground that it relates to a matter which is not primarily the concern of the Local Government.

Prohibitions against Resolutions

Rule 24A. No discussion of a matter of general public interest shall take place **otherwise** than on a resolution moved in accordance with rules governing the moving of resolutions except with the consent of the President & the member of the Government to whose department the motion relates.

2. It shall not be permissible to the President or to the member of the Government concerned to give his consent to the moving of any motion in regard to any of the subjects in regard to which a resolution cannot be moved.

(iii) Motion for adjournment

Rules 11 and 12

Rule 11. A motion for an adjournment of the business of the Council for the purpose of discussing a definite matter of urgent public importance may be made.

Rule 12. This is subject to the following restrictions.

(i) Only one such motion shall be made at the same sitting.

(ii) Not more than **one matter** can be discussed. It must be restricted to **specific matter** of **recent** occurrence.

(iii) Motion must not raise a matter already disposed of: must not revive.

(iv) Motion must not anticipate a matter already on the agenda or of which notice is given.

1. A motion must not deal with a matter on which a resolution could not be moved.

2. The President must give his consent.

(iv) Motion of Want of Confidence

Rule 12A. A motion expressing want of confidence in a minister or a motion disapproving the policy of the minister in a particular.

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3

NOTES ON HISTORY OF INDIA

[Reproduced from the handwritten manuscripts—ed.]

I

More important for the history of India were the conquests of the Sakas and Yueh-chih, nomad tribes of Central Asia similar to the modern Turkomans.[1] The former are first heard of in the basin of the river Ili, and being dislodged by the advance of the Yueh-chih moved southwards reaching north-western India about 150 B.C. Here they founded many small principalities, the rulers of which appear to have admitted the suzerainty of the Parthians for some time and to have borne the title of Satraps. It is clear that western India was parcelled out among foreign princes called Sakas, Yavanas, or Pallavas whose frontiers and mutual relations were constantly changing. The most important of these principalities was known as the Great Satrapy which included Surashtra (Kathiawar) with adjacent parts of the mainland lasted until about 395 A. D

The Yueh-chih started westwards from the frontiers of China about 100 B. C. and, driving the Sakas before them, settled in Bactria. Here Kadphises, the chief of one of their tribes, called the Kushans, succeeded in imposing his authority on the others who coalesced into one nation henceforth known by the tribal name. The chronology of the Kushan Empire is one of the vexed questions of Indian history and the dates given below are stated positively only because there is no space for adequate discussion and are given with some scepticism, that is desire for more knowledge founded on facts. Kadphises I (c. 15-45 A. D.) after consolidating his Empire led his armies southwards, conquering Kabul and perhaps Kashmir. His successor Kadphises II (c. 45-78 A. D.) annexed

1 But perhaps not in language. Recent research marks it probable that the Kushans or Yueh-chih used an Iranian idiom.

the whole of north-western India, including northern Sind, the Punjab and perhaps Benares. There was a considerable trade between India and the Roman Empire at this period and an embassy was sent to Trojan, apparently by Kanishka (c. 78-123), the successor of Kadphises. This monarch played a part in the later history of Buddhism comparable with that of Asoka in earlier ages.[1] He waged war with the Parthians and Chinese, and his Empire which had its capital at Peshawar included Afghanistan, Bactria, Kashgar, Yarkhand, Khotan[2] and Kashmir. These dominions, which perhaps extended as far as Gaya in the east, were retained by his successors Huvishka (123-140 A. D.) and Vasudeva (140-178 A. D.) but after this period the Andhra and Kushan dynasties both collapsed as Indian powers, although Kushan kings continued to rule in Kabul. The reasons of their fall are unknown but may be connected with the rise of the Sassanids in Persia. For more than a century, the political history of India is a blank and little can be said except that the kingdom of Surastra continued to exist under a Saka dynasty.

Light returns with the rise of the Gupta dynasty, which roughly marks the beginning of modern Hinduism and of a reaction against Buddhism. Though nothing is known of the fortunes of Patali-putra, the ancient imperial city of the Mauryas, during the first three centuries of our era, it continued to exist. In 320 a local Raja known as Candragupta I increased his dominions and celebrated his coronation by the institution of the Gupta era. His son Samudra Gupta continued his conquests and in the course of an extraordinary campaign, concluded about 340 A. D. appears to have received the submission of almost the whole peninsula. He made no attempt to retain all this territory but his effective authority was exercised in a wide district extending from the Hugli to the rivers Jumna and Chambal in the west and from the Himalayas to the Narbuda. His son Candragupta II or Vikramaditya added to these possessions Malwa, Gujarat and Kathiawar and for more than half a century the Guptas ruled undisturbed over nearly all northern India except

1 Fleet and Franke consider that Kanishka preceded the two Kadphises and began to reign about 58 B. C.

2. He appears to have been defeated in these regions by the Chinese general Pan-chao about 90 A. D. but to have been more successful about fifteen years later.

Rajputana and Sind. Their capital was at first Pataliputra, but afterwards Kausambi and Ayodhya became royal residences.

The fall of the Guptas was brought about by another invasion of barbarians known as Huns, Ephthalites [1] or White Huns and apparently a branch of the Huns who invaded Europe. This branch remained behind in Asia and occupied northern Persia. They invaded India first in 455, and were repulsed, but returned about 490 in greater force and overthrew the Guptas. Their kings Tormana and Mihiragula were masters of northern India till 540 and had their local capital at Sialkot in the Panjab, though their headquarters were rather in Bamiyan and Balkh. The cruelties of Mihiragula provoked a coalition of Hindu princes. The Huns were driven to the north and about 565 A. D. their destruction was completed by the allied forces of the Persians and Turks. Though they founded no permanent states their invasion was important, for many of them together with kindered tribes such as the Gurjars (Gujars) remained behind when their political power broke up and, like the Sakas and Kushans before them, contributed to form the population of north-western India, especially the Rajput clans.

The defeat of the Huns was followed by another period of obscurity, but at the beginning of the seventh century Harsha (606-647 A. D.), a prince of Thanesar, founded after thirty five years of warfare, a state which though it did not outlast his own life, emulated for a time the dimensions and prosperity of the Gupta Empire. We gather from the account of the Chinese pilgrim Hsuan Chaung, who visited his court at Kanauj, that the kings of Bengal, Assam and Ujjain were his vassals but that the Panjab, Sind and Kashmir were independent. Kalinga, to the south of Bengal was depopulated but Harsha was not able to subdue Pulakesin II, the Calukya king of the Deccan.

Let us now turn for a moment to the history of the south. It is even more obscure both in events and chronology than that of the north, but we must not think of the Dravidian countries as uninhabited or barbarius. Even the classical writers of Europe had some

1. For authorities see Vincent Smith, *Early History of India,* 1908, p. 401.

knowledge of them. King Pandion (Pandya) sent a mission to Augustus in 20 B. C.[1] Pliny[2] speaks of Modura (Madura) and Ptolemy also mentions this town with about forty others. It is said[3] that there was a temple dedicated to Augustus at Maziris, identified with Craganore. From an early period the extreme south of the peninsula was divided into three states known as the Pandya, Cera and Cola kingdoms.[3] The first corresponded to the districts of Madura and Tinnevelly. Cera and Kerala lay on the west coast in the modern Travancore. The Cola country included Tanjore, Trichinopoly, Madras, with the greater part of Mysore. From the sixth to the eighth century A. D. a fourth power was important, namely the Pallavas, who apparently came from the north of the Madras presidency. They had their capital at Canjeevaram and were generally at war with the three kingdoms. Their king, Narasimha-Varman (625-645 A. D.) ruled over part of the Deccan and most of the Cola country but after about 750 they declined, whereas the Colas grew stronger and Rajaraja (985-1018) whose dominions included the Madras Presidency and Mysore made them the paramount power in southern India, which position they retained until the thirteenth century.

As already mentioned, the Deccan was ruled by the Andhras from 220 B. C. to 236 A. D., but for the next three centuries nothing is known of its history until the rise of the Calukya dynasty at Vatapi (Badami) in Bijapur. Pulakesin II of this dynasty (608-642), a contemporary of Harsha, was for some time successful in creating a rival Empire which extended from Gujarat to Madras, and his power was so considerable that he exchanged embassies with Khusru II, King of Persia, as is depicted in the frescoes of Ajanta. But in 642 he was defeated and slain by the Palavas.

With the death of Pulakesin and Harsha begins what has been called the Rajput period, extending from about 650 to 1000 A. D. and characterized by the existence of numerous kingdoms ruled by dynasties nominally Hindu, but often descended from northern

1. Strabo xv. 4. 73.

2. Hist. Nat. vi. 23. (26).

3. The inscriptions of Asoka mention four kingdoms, Pandya, Keralaputra, Cola, and Satiyaputra.

invaders or non-Hindu aboriginal tribes. Among them may be mentioned the following :—

1. Kanauj or Panchala. This kingdom passed through troublous times after the death of Harsha but from about 840 to 910 A. D. under Bhoja (or Mihira) and his son, it became the principal power in northern India, extending from Bihar to Sind. In the twelfth century it again became important under the Gaharwar dynasty.

2. Kanauj was often at war with the Palas of Bengal, a line of Buddhist kings which began about 730 A. D. Dharmapala (c. 800 A. D.) was sufficiently powerful to depose the king of Kanauj. Subsequently the eastern portion of the Pala Kingdom separated itself under a rival dynasty known as the Senas.

3. The districts to the south of the Jumna known as Jejak-abhukti (Bundelkhand) and Cedi (nearly equivalent to our Central Provinces) were governed by two dynasties known as Candels and Kalacuris. The former are thought to have been originally Gonds. They were great builders and constructed among other monuments the temples of Khajurao. Kirtivarman Chandel (1049-1100) greatly extended their territories. He was a patron of learning and the allegorical drama Prabodhacandrodaya was produced at his Court.

4. The Paramara (Pawar) dynasty of Malwa were likewise celebrated as patrons of literature and kings Munja (974-995) and Bhoja (1018-1060) were authors as well as successful warriors.

II

Saka Period

According to Vincent Smith, after first adopting A. D. 78 which appeared the most probable, finally chose 120 A. D. and we may agree that this date marks the beginning of the Saka period inaugurated by Kanishka.

The order in which the chief Kushan kings followed is still doubtful. It is generally agreed that Kanishka came after Kadphises I (Kujula Kara Kadphises) and II (Vima Kadphises). The

former of these two, a Bactrinized Scythian, must, in Dr. Smith's view, have assumed power about 40 A. D. He seized Gandhara and the country of Taxila from Gondophares, the Parthian prince who, according to the apocryphal acts of the apostles, received St. Thomas. His son Vima (78-110) carved out a great empire for himself, embracing the Punjab and the whole western half of the Ganges basin.

There seems to have been an interval of about 10 years between Kadphises and Kanishka, the latter was the son of one Vajheshka and no relation of his predecessor, he seems to have been from Khotan, not Bactria, and indeed he spent the summer at Kapisi in Paropan... *[1] and the winter at Purushapura (Peshawar) the axis of his empire was no longer in the (midst)*[2] of the Graeco-Iranian country.

The empire of Kanishaka did not last long. Of his two sons, Vasishka and Havishka only the second survived him.

The power of the Kushans in the third century was reduced to Bactria with Kabul and Gandhara, and they fell beneath the yoke of the Sassanids.

Kshatrappas or Satraps.

This title, which is Iranian, is borne by two dynasties founded by the Sakus who had been driven from their country by the Yuch-chi invasion.

I. The first was established in Surashtra (Kathewar). One prince of this line Chasthana, seems to have held Malwa before the great days of the Kushans and to have become a vassal of Kanishka; he ruled over Ujjayini, which was the centre of the Indian civilization.

II. The second line to which the name of Kshaharata is more particularly attached, was the hereditary foe of the Andhras; it ruled over Maharashtra, the country between modern Surat and Bombay. It was this latter Saka state that was annihilated by the

*[1]Letters missing in ms. —ed.

*[2]inserted as eaten by termite—ed.

Satakarni and it was the former which arranged it, when Rudraman, the Satrap of Ujjayini conquered the Andhra King. The antagonism between the eastern & western states seems to have been accompanied by a difference of ideals. The Sakas, like all the Scythians of India or Serindia, such as the Thorkhans, retained from their foreign origin a sympathy for Buddhism, whereas the Andhras were keen supporters of Brahmanism.

The Guptas

The events of the third century are unknown to history and we have very little information about the Kushan empire.

Day light returns in 318-19, when there arises in the old country of Magadha a new dynasty-Gupta.

The Guptas-Chandragupta II conquered the country of Malvas, Gujrath and Surashtra (Kathiwar) overthrowing the 1st great Satrap of the Saka dynasty of Ujjain. As an extension of his territory westward he made Ayodhya and Kausambi his capitals instead of Pataliputra. About 155 (B.C.) he conquered the whole of the lower Indus and Kathewar, waged war in Rajputana, and Oudh but took Mathura (Muttra) on the Jumna, and even reached Pataliputra.

He was severely defeated by Pushyamitra (?). Bactriana was at least in the north, a barrier between Parthia and India. India was therefore less exposed to attack from Parthia. Nevertheless, there was at least one Parthian ruler, Mithradates I (171-136) who annexed the country of Taxila for a few years, about 138.

End of the independence of Parthia and Bactria

The event that put an end to the independence of Parthia and Bactria was a new invasion, resulting from a movement of tribes, which had taken place far away from India in the Mongolian steppes.

About 170 (B. C.) a horde of nomadic Scythians, the Yuch-chi or Tokharians, being driven from Gobi, the present Kansu, by the

Hiang-nu or Huns, started on a wild migration which upset the whole balance of Asia.

They fell on the Sakas, who were Iranianized Scythians dwelling north of the Persion empire and settled in their grazing grounds north of the Jazartes. The expelled Sakas fell on Parthia and Bactriana, obliterating the last vestiges of Greek rule, between 140 and 120 (B. C.) Then the Tokharians, being defeated in their turns by the Wu-Sun tribe, established themselves on the Oxus, and after that took all the country of the Sakas in eastern Iran at the entrance to India. That entrance was found in the first century after Christ.

The conquest of India was the work of the Kushans (Kushana), a dynasty which united the Yue-Chi tribes and established their dominion both over their own kinsfolk the Sakas of Parthia and over peoples of the Punjab.

The accession of the principal King of this line, Kanishka, was placed at uncertain dates between 57 B. C. and A. D. 200.

Pushyamitra—a mayor of the Palace as Sybrani Livi called him.

The Seleucid Empire ruled by Antiochos III (261-246 B. C.) and lost two provinces Parthia and Bactriana which emancipated themselves simultaneously. The Parthians whom the Indians called Pahalvas, were related to the nomads of the Turkoman steppes and occupied the country south-east of the Caspian. The Bactrians bordered on the Parthians on the north-east and were settled between the Hindu Kush and the Oxus ; the number and wealth of their towns were legendary. These two peoples seem to have taken advantage of the difficulties of Antiochos and his successors, Seleucos II (246-226 B. C.) and III (226-223 B. C.) in the west to break away.

The Parthian revolt was a natural movement, led by Arsaces, the founder of a dynasty which was to rule Persia for nearly 500 years.

The Bactrian rising was brought about by the ambition of a Greek satrap. Diodotos, represents an outbreak of Hellennism in the heart of Asia.

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There is no doubt that the formation of these enterprizing nations on the Indo-Iranian border helped to shake the empire of Ashoka in the time of his successors.

The Punjab, once a Persian satrapy and then a province of Alexander, was to find itself still more exposed to attack, now that smaller but turbulent states had arisen at its doors. After Diodotos I & II, the King of Bactria was Euthidemes, who went to war with Antioches the Great of Syria. Peace was concluded with the recognition of Bactrian independence about 208. But during hostilities Syrian troops had crossed the Hindu Kush and enterning the Kabul valley had severely dispoiled the ruler Subhagasena. Demetrius, the son of Enthidemos, increased his dominion not only in the present Afghanistan but in India proper, and bore the title of King of the Indians (200-190). Between 190 and 180 there were Greek adventurers reigning at Taxila, named Paleon & Agathocles. From 160 to 140 roughly, Kabul and the Punjab were held by a pure Greek, Milinda or Minander, who left a name in the history of Buddhism.

III

Huns

In the last years of Kumargupta new Iranian peoples assailed the empire, but they were kept back from the frontiers. Under Skandagupta, the first wave of formidable migration came down upon the same frontiers. This consisted of nomad Mongoloids to whom India afterwards gave the genuine name of Huna, under which we recognised the Huns who invaded Europe.

Those who reached India after the middle of the fifth century were white Huns or Ephthalites, who in type were closer to the Turks than to the hideous followers of Attila. After a halt in the valley of the Oxus they took possession of Persia and Kabul. Skandagupta had driven them off for a few years (455 A. D.) but after they had slain Firoz the Sassanid in 484, no Indian state could stop them. One of them, named Toramana, established himself among the Malavas in 500 and his son Mihirgula set up his capital at Sakol (Sialkot) in the Punjab.

A native prince Yeshodharman shook off the yoke of Mihirgula. The expulsion of the Huns was not quite complete everywhere. A great many resided in the basin of the Indus.

At the beginning of the 7th century a power arose from the chaos in the small principality of Sthanvisvara (Thaneshwar, near Delhi). Here a courageous Raja Prabhakar Vardhan organized a kingdom, which showed its mettle against the Gurjars, the Malwas and other neighbouring princes. Shortly after his death in 604 or 605 his eldest son was murdered by the orders of the king of Gauda in Bengal. The power fell to his younger brother Harsha.

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4

MANU AND THE SHUDRAS

[This is a 31 page handwrittten Ms. of Dr. Ambedkar. The chapter has no title. It is also left incomplete. The title is suggested—editor.]

I

The reader is now aware that in the Scheme of Manu there were two principal social divisions: those outside the Chaturvarna and those inside the Chaturvarna. The reader also knows that the present day Untouchables are the counterpart of those outside the Chaturvarna and that those inside the Chaturvarna were contrasted with those outside. They were a composite body made up of four different classes, the Brahmins, the Kshatriyas, the Vaishyas and the Shudras. The Hindu social system is not only a system in which the idea of classes is more dominant than the idea of community but it is a system which is based on inequality between classes and therefore between individuals. To put it concretely, the classes i.e. the Brahmins, Kshatriyas, Vaishyas, Shudras and Antyajas (Untouchables) are not horizontal, all on the same level. They are vertical i.e. one above the other. No Hindu will controvert this statement. Every Indian knows it. If there is any person who would have any doubt about it he can only be a foreigner. But any doubt which a foreigner might have will be dissolved if he is referred to the law of Manu who is the chief architect of the Hindu society and whose law has formed the foundations on which it is built. For his benefit I reproduce such texts from the Manu Smriti as go to prove that Hindu society is based on the principle of inequality.

II

It might be argued that the inequality prescribed by Manu in his Smriti is after all of historical importance. It is past history and cannot be supposed to have any bearing on the present conduct of the Hindu. I am sure nothing can be greater error than this. Manu is not a matter of the past. It is even more than a past of the present. It is a 'living past' and therefore as really present as any present can be.

That the inequality laid down by Manu was the law of the land under the pre-British days may not be known to many foreigners. Only a few instances will show that such was the case.

Under the rule of the Marathas and the Peshwas the Untouchables were not allowed within the gates of Poona city, the capital of the Peshwas between 3 p.m. and 9 a.m. because, before nine and after three, their bodies cast too long a shadow; and whenever their shadow fell upon a Brahmin it polluted him, so that he dare not taste food or water until he had bathed and washed the impurity away. So also no Untouchable was allowed to live in a walled town ; cattle and dogs could freely enter but not the Untouchables[1].

Under the rule of the Marathas and the Peshwas the Untouchables might not spit on the ground lest a Hindu should be polluted by touching it with his foot, but had to hang an earthen pot round his neck to hold his spittle. He was made to drag a thorny branch of a tree with him to brush out his footsteps and when a Brahman came by, had to lie at a distance on his face lest his shadow might fall on the Brahman[2].

In Maharashtra an Untouchable was required to wear a black thread either in his neck or on his wrist for the purpose of ready identification.

In Gujarat the Untouchables were compelled to wear a horn as their distinguishing mark[3].

In the Punjab a sweeper was required while walking through streets in towns to carry a broom in his hand or under his armpit as a mark of his being a scavenger[4].

In Bombay the Untouchables were not permitted to wear clean or untorn clothes. In fact the shopkeepers took the precaution to see that before cloth was sold to the Untouchable it was torn & soiled.

1. Dr. Murray Mitchell-Great Religions of India, p. 63
2. Bombay Gazetteer. Vol. XII. p. 175.
3. Ency R &. E. Vol. IX p. 636 (b).
4. Punjab Census Report 1911 p. 413.

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In Malabar the Untouchables were not allowed to build houses above one storey in height[1] and not allowed to cremate their dead [2].

In Malabar the Untouchables were not permitted to carry umbrellas, to wear shoes or golden ornaments, to milk cows or even to use the ordinary language of the country[3].

In South India Untouchables were expressly forbidden to cover the upper part of their body above the waist and in the case of women of the Untouchables they were compelled to go with the upper part of their bodies quite bare[4].

In the Bombay Presidency so high a caste as that of Sonars (gold- smiths) was forbidden to wear their Dhoties with folds[5] and prohibited to use *Namaskar* as the word of salutation[6].

Under the Maratha rule any one other than a Brahmin uttering a Veda Mantra was liable to have his tongue cut off and as a matter of fact the tongues of several Sonars (goldsmiths) were actually cut off by the order of the Peshwa for their daring to utter the Vedas contrary to law.

1. Bhattacharya-p. 259.

2. Madras Census 1891. p. 299

3. Bhatacharya-Hindu Castes-p. 259.

4. Madras Census 1891 p. 224

5. This mode of wearing dhoties was referred for Brahmins only. The Shudras were to wear it without folds.

6. The following letter will be interesting to the reader as it throws a flood of light as to whether the Dharma prescribed by Manu was or was not the law of the land-

"To

Damulsett Trimbucksett

Head of the Caste of Goldsmiths.

"The Hon'ble the President in Council having thought proper to prohibit the Caste of Goldsmiths from making use of the from of salutation termed Namaskar, you arc hereby pre-emptorily enjoined to make known this order and resolution to the whole caste and to take care that the same be strictly observed.

By order
Bombay Castle sig. W. Page
9th August 1779. Secretary to Government.

Resolution of Government

Dated 28th July 1779

"Frequent disputes having arisen for some time between the Brahmins and Goldsmiths respecting a mode of salutation termed "Namaskar" made use of by the latter, and which the Brahmins allege they have no right to perform, and that the exercise of such ceremony by the Goldsmiths is a great breach and profanation of the rights of the Gentoo [Hindu] Religion, arid repeated complaints having been made to us by the Brahmins, and the Peishwa also having several times written to the President, requesting the use of the Namaskar might be prohibited to the Goldsmiths-Resolved as it is necessary. This matter should be decided by us in order that the dispute between the two castes may be put an end to and the Brahmins appear to have reason for their complaint, that the Goldsmiths be forbidden the use of the Namaskar, and this being a matter wherein the Company's interest is not concerned, our Resolution may be put on the looting of a compliment to the Peishwa whom the President is desired to make acquainted with our determination."

All over India Brahamin was exempt from capital punishment. He could not be hanged even if he committed murder.

Under the Peshwas distinction was observed in the punishment of the criminals according to the caste. Hard labour and death were punishments mostly visited on the Untouchables[1].

Under the Peshwas Brahmin clerks had the privilege of their goods being exempted from certain duties and their imported corn being carried to them without any ferry charges; and Brahmin landlords had their lands assessed at distinctly lower rates than those levied from other classess. In Bengal the amount of rent for land varied with the caste of the occupant and if the tenant was an Untouchable he had to pay the highest rent.

These facts will show that Manu though born some time before B. C. or sometime after A. D. is not dead and while the Hindu Kings reigned, justice between Hindu and Hindu, touchable and untouchable was rendered according to the Law of Manu and that law was avowedly based on inequality.

III

This is the dharma laid down by Manu. It is called Manav Dharma i.e. Dharma which by its inherent goodness can be applied to all men in all times and in all places. Whether the fact that it has not had any force outside India is a blessing or a curse I do not stop to inquire. It is important to note that this Manav Dharma is based upon the theory that the Brahman is to have all the privileges and the Shudra is not to have even the rights of a human being, that the Bramhan is to be above everybody in all things merely by reason of his high birth and the Shudra is to be below everybody and is to have none of the things no matter how great may be his worth.

Nothing can show the shamelessness and absurdity of this Manava Dharma better than turning it upside down. I know of no better attempt in this behalf than that of Dr. R.P. Pranjape a great Educationist, Politician and Social reformer and I make no appology for reproducing it in full—

1. G. B. Forrest, *Official Writings of Mount Stuart Elphinstone,* 1884. pp. 310-11.

A Peep Into the Future[1]

* * * * *

This piece was written against the Non-Brahmin Parties which were then in power in the Bombay and Madras Presidency and in the Central Provinces. The Non-Brahmin parties were founded with the express object of not allowing a single community to have a monopoly in State Service. The Brahamins have a more or less complete monopoly in the State services in all provinces in India and in all departments of State. The Non-Brahmin parties had therefore laid down the principle, known as the principle of communal ratio, that given minimum qualifications candidates belonging to non-Brahmin communities should be given preference over Brahmin candidates when making appointments in the public services. In my view there was nothing wrong in this principle. It was undoubtedly wrong that the administration of the country should be in the hands of a single community however clever such a community might be.

The Non-Brahamin Party held the view that good Government was better than efficient Government was not a principle to be confined only to the composition of the Legislature & the Executive. But that it must also be made applicable to the field of administration. It was through administration that the State came directly in contact with the masses. No administration could do any good unless it was sympathetic. No administration could be sympathetic if it was manned by the Brahamins alone. How can the Brahamin who holds himself superior to the masses, despises the rest as low caste and Shudras, is opposed to their aspiration, is instinctively led to be partial to his community and being uninterested in the masses is open to corruption be a good administrator ? He is as much an alien to the Indian masses as any foreigner can be. As against this the Brahmins have been taking their stand on efficiency pure & simple. They know that this is the only card they can play successfully by reason of their advanced position in education. But they forget that if efficiency was the only criterion then in all probability there would be very

1. Reproduced from-Gujarati Punch-May 1921 (Not quoted in the Ms.—ed.)

little chance for them to monopolize State service in the way and to the extent they have done. For if efficiency was made the only criterion there would be nothing wrong in employing Englishmen, Frenchmen, Germans & Turks instead of the Brahmins of India. Be that as it may, the Non-Brahmin Parties refused to make a fetish to efficiency and insisted that there must be introduced the principle of communal ratio in the public services in order to introduce into the administration an admixture of all castes & creeds and thereby make it a good administration. In carrying out this principle the Non-Brahmin Parties in their eagerness to cleanse the administration of Brahmindom while they were in power, did often forget the principle that in redressing the balance between the Brahmins and non-Brahmins in the public services they were limited by the rule of minimum efficiency. But that does not mean that the principle they adopted for their guidance was not commendable in the interests of the masses.

This policy no doubt set the teeth of many Brahmins on edge. They were vehement in their anger. This piece by Dr. Paranjpe is the finest satire on the policy of the non-Brahmin Party. It caricatures the principle of the non-Brahman party in a manner which is inimitable and at the time when it came out, I know many non-Brahmin leaders were not only furious but also speechless. My complaint against Dr. Paranjpe is that he did not see the humour of it. The non-Brahmin Party was doing nothing new. It was merely turning Manu Smriti upside down. It was turning the tables. It was putting the Brahmin in the position in which Manu had placed the Shudra. Did not Manu give privileges to Brahmin merely because he was a Brahmin ? Did not Manu deny any right to the Shudra even though he deserved it ? Can there be much complaint if now the Shudra is given some privileges because he is a Shudra ? It may sound absurd but the rule is not without precedent and that precedent is the Manu Smriti itself. And who can throw stones at the non-Brahmin Party ? The Brahmins may if they are without sin. But can the authors and worshippers, upholders of Manu Smriti claim that they are without sin ? Dr. Paranjpe's piece is the finest condemnation of the inquity that underlies this Manav Dharma. It shows as nothing else does what a Brahmin feels when he is placed in the position of a Shudra.

IV

Inequality is not confined to Hindus. It prevailed elsewhere also and was responsible for dividing society into higher and lower free and servile classes. (Left incomplete in Ms—ed.)

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5

PRESERVATION OF SOCIAL ORDER

[These are four handwritten pages of the manuscripts by Dr. Ambedkar with extracts from scriptures typed intermittently. The first page is numbered 56, which shows that the earlier part is not available. So also later portion is missing Title of the Chapter is suggested—ed.]

* * * *

> XII, 100. "Command of armies, royal authority, power of inflicting punishment, and sovereign dominion over all nations, he only well deserves, who perfectly understands the Veda Sastra. (i.e. one who is a Brahmin) (**Manu Smriti**)

The second technique devised for the maintainance and preservation of the Established Order is quite different from the first. Really speaking it is this which constitutes a special feature of the Hindu Social Order.

In the matter of the preservation of the Social Order from violent attack it is necessary to bear in mind three considerations. The outbreak of a Revolution is conditioned by three factors. (1) The existence of a sense of wrong, (2) Capacity to know that one is suffering from a wrong and (3) availability of arms. The second consideration is that there are two ways of dealing with a rebellion. One is to prevent a rebellion from occurring and the other is to suppress it after it has broken out. The third consideration is that whether the prevention of rebellion would be feasible or whether the suppression of rebellion would be the only method open, would depend upon the rules which govern the three prerequites of rebellion.

Where the Social Order denies oppurtunity to rise, denies right to education, and denies right to use arms it is in a position to prevent rebellion against the Social Order. Where on the other hand a Social Order allows oppurtunity to rise, allows right to education, and permits the use of arms it cannot prevent rebellion by those who suffer wrongs. Its only remedy to preserve the

Social Order by suppressing rebellion by the use of force and violence. The Hindu Social Order has adopted the first method. It has fixed the social status of the lower orders for all generations to come. Their economic status is also fixed. There being no disparity between the two there is no possibility of a grievance growing up. It has denied education to the lower orders. The result is that no one is conscious that his low condition is a ground for grievance. If there is any consciousness it is that no one is responsible for the low condition. It is the result of fate. Assuming there is a grievance, assuming there is consciousness of grievance there cannot be a rebellion by the lower orders against the Hindu Social Order because the Hindu Social order denies the masses the right to use arms... Social Orders such as use of . . . . . follow the opposite course. They allow equal opportunity to all. They allow freedom to acquire knowledge, they allow the right to bear arms and take upon themselves the odium of suppressing rebellious force & violence. To deny freedom of oppuortunity, to deny freedom to acquire knowledge, to deny the right to arms is a most cruel wrong. Its result to . . . . . .and man. The Hindu Social Order is not ashamed to this. It has however achieved two things. It has found the most effective even though it be the most shamless method of preserving the established Order. Secondly notwithstanding the use of most inhuman means of killing manliness, it has given to the Hindus the reputation of being a very humane people.

Another special feature of the Hindu Social Order relates to the technique devised for its preservation.

The technique is twofold.

The first technique is to place the responsibility of upholding and maintaining the social order upon the shoulders of the King. Manu does this in quite express terms.

> VIII. 410. "The king should order each man of the mercantile class to practice trade, or money-lending, or agriculture and attendance on cattle ; and each man of the servile class to act in the service of the twice-born."

VIII. 418. "With vigilant care should the King exert himself in compelling merchants and mechanics to perform their respective duties ; for, when such men swerve from their duty, they throw this world into confusion."

Manu does not stop with the mere enunciation of the duty of the King in this behalf. He..... to ensure that the King shall at all times perform his duty to maintain and preserve the Established Order. Manu therefore makes two further provisions. One provision is to make the failure of the King to maintain the Established Order an offence for which the King become liable for prosecution and punishment like a common man. This would be clear from the following citations from Manu—

VIII. 335. "Neither a father, nor a preceptor, nor a friend, nor a mother, nor a wife, nor a son, nor a domestic priest must be left unpunished by the king, if they adhere not with firmness to their duty."

VIII. 336. "Where another man of lower birth would be fined one pana, the king shall be fined a thousand, and he shall give the fine to the priests, or cast it into the river, this is a sacred rule."

The other provision made by Manu against a King who is either negligent or opposed to the Established Order is to invest the three classes, Brahmins, Kshatriya and Vaishya with a right to rise in armed rebellion against the King.

VIII. 348. "The twice-born may take arms, when their duty is obstructed by force ; and when, in some evil time, a disaster has befallen the twice-born classes."

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6

WITH THE HINDUS

[Reproduced from the handwritten Ms—ed]

It is impossible to believe that Hindus will ever be able to absorb the Untouchables in their society. Their Caste System and the Religion completely negative any hope being entertained in this behalf. Yet there are incorrigible optimists more among the Hindus than among the Untouchables, who believe in the possibility of the Hindus assimilating the Untouchables. Whether these incorrigible optimists are honest or dishonest in their opinion is a question which cannot be overlooked. Within what time this assimilation will take place, they are unable to define. Assuming that the optimists are honest, there can be no question that this process of assimilation is going to be a long drawn process extending over many centuries. In the meantime the Untouchables will have to live under the Social and political sway of the Hindus, and continue to suffer all the tyrannies and oppressions to which they have been subjected in the past. Obviously no sane man will think of leaving them to the will and the pleasure of the Hindus in the hope that some day in the unpredictable future they will be assimilated by the Hindus. Long or short, there will be a period of transition and some provision must be made against the tyranny and oppression by the Hindus. What provisions should be made in this behalf ? If the question is left to the Untouchables they will ask for two provisions being made : one for Constitutional Safeguards and two for Separate Settlements.

I

The nature of Constitutional Safeguards for the protection of the Untouchables have been defined by the All-India Scheduled Caste Federation, apolitical organization of the Untouchables of India in the form of resolutions. Resolution Nos. 3 and 7 in which they are defined are set out below :

Resolution No. 3

[Quote p. 359]

(Not written in the Ms—ed.)

Resolution No. 7

[Quote p. 361]

(Not written in the Ms—ed.)

The Hindus are very reluctant to allow the Untouchables these safeguards. The objection is general. There is also objection to particular safeguards. The general objection that the Untouchables are not a minority and therefore they are not entitled to safeguards which may be allowed to other minorities. The argument proceeds that the basis of a community to be called a minority is Religion if one is entitled to be recognized as a minority. The Untouchables are not separate from the Hindus in the matter of the religion. Consequently they are not a minority. That this definition of a minority is childish will be obvious to all those who have studied the question.

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7

FRUSTRATION

The Untouchables are the weariest, most loathed and the most miserable people that history can witness. They are a spent and sacrificed people. To use the language of Shelley they are—

> "pale for weariness of climbing heaven, and gazing on earth, wandering companionless
>
> Among the stars that have a different birth"

To put it in simple language the Untouchables have been completely overtaken by a sense of utter frustration. As Mathew Arnold says[1] "life consists in the effort to affirm one's own essence ; meaning by this, to develop one's own existence fully and freely, to have ample light and air, to be neither (. . . . . .)* nor overshadowed. Failure to affirm ones own essence is simply another name for frustration. Its nonfulfilment of one's efforts to do the best, the withering of one's faculties, the stunting of one's personality."

Many people suffer such frustrations in their history. But they soon recover from the blight and rise to glory again with new vibrations. The case of the Untouchables stands on a different footing. Their frustration is frustration for ever. It is unrelieved by space or time.

In this respect the story of the Untouchables stands in strange contrast with that of the Jews.

Their captivity in Egypt was the first calamity that visited the Jewish people. As the Bible says

[Quote Childern's Bible-39] (Quotation not recorded—ed.)

Ultimately Pharaoh yielded. The Jewish people escaped captivity and went to Cannan and settled there in the land flowing with milk and honey.

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[1] Essays on Democracy

* Erased from the MS—ed.

The second calamity which overtook the Jews was the Babylonian Captivity. (Some pages are missing—ed.)

We can now explain why the Untouchables have suffered frustration. They have no plus condition of body and mind. They have nothing in their dull drab deadening past for a hope of a rise in the future to feed upon. This is due to no fault of theirs. The frustration which is their fate is the result of the unpropitious social environment born out of the Hindu Social Order which is so deadly inimical to their progress.

Their fate is entirely unbearable. As Carlyle has said—

[Quote p. 201]

(Quotation not cited—ed.)

Some are thinking of revolutions, even bloody revolutions to overthrow the Hindu Social Order. All are saying what Cabli Williams once said—

[Quote p. 152]

(Quotation not cited—ed.)

Such is the degree of frustration they feel

III

The Covenant with God may be interpreted to mean in the language of Emerson a **plus** condition of mind and body. As Emerson has said "Success is constitutional-depends on a **plus** condition of mind and body—on power of work—on courage. Success goes invariably with a certain plus or positive power : An ounce of Power must balance an ounce of weight."

If the Jews rose after their first captivity, it was primarily because of their **plus** condition of mind and body. This plus condition of mind and body can arise from two sources. It can arise from reliance on God. God, if nothing else is at least a source of power and in emergency man needs mental power, the plus condition of

* Erased-ed. Essay on Democracy.

mind and body which is necessary for success. There is therefore nothing wrong in the suggestion that the Jews succeeded because of their Covenant of God if it is interpreted in the right way.

IV

This plus condition of body and mind is also the result of Social Environment, if the Environment is propitious. In a society where there is exemption from restraint, a secured release from obstruction, in a society where every man is entitled not only to the means of being, but also of well-being, where no man is forced to labour so that another may abound in luxuries, where no man is deprived of his right to cultivate his faculties and powers so that there may be no competition with the favoured, where there is emphasis of reward by mento, where there is goodwill towards all, (Further portion of this part is erased and not legible—ed.)

(The above portions are in the handwriting of Dr. Ambedkar. Each part is written on a separate sheet—ed.).

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8

The Problem of Political Suppression*

The introduction of the principle of political liberty in India has been very tardy & gradual. It began in the year 1892 when the principle of popular representation in the Constitution of the Legislatures was introduced. It was expanded in 1909. There were two defects in the popular representation as it stood in 1909. The first defect was the franchise was very high. It was so high that a large mass of people were excluded. Those to whom it reached were the aristocracy of the Hindus and the Muslims. The second defect was that the scheme of popular representation was confined to the Legislature. It did not extend to the Executive. The Executive continued to be independent. The Legislature could neither make or unmake the Executive. The next was taken in 1919. Curiously enough, in the scheme of 1919 the principle of popular representation was applied to the Executive without applying it in commensurate degree to the Legislature. This happened because the political movement in India was led largely by the higher classes. They have always been more anxious for Executive power than for extension of franchise. It is natural. For they stood to gain by executive power. While those who would gain by franchise were the masses.

The higher classes having the ear of the British authorities pressed for executive power and succeeded getting it without the extension of franchise.

The franchise was no doubt extended much beyond the bounds fixed in 1909. But it did not touch the Untouchables. Indeed they are so poor that nothing except adult franchise would bring the Untouchables on the electoral roll.

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* This is a six page handwritten manuscript of Dr. Ambedkar numbered as Chapter XIII of the scheme 'Hindu Social Order.' From the last sentence, the chapter seems to have been left incomplete—ed.

The Government of India was very much perturbed. They could do very little. But they did express their anxiety about placing the Untouchables under the political domination of the high caste Hindus without giving the Untouchables the right to vote in the election. In their despatch of 19th March 1919 the Government of India observed—

[Quote]

The situation was altered in 1935 under the scheme proposed by the British Government under what is called the Communal Award.

(i) The Untouchables were to have a differential franchise so as to enfranchise about ten per cent of their population.

(ii) The Untouchables were not only to have a differential franchise, they were to have certain number of seats reserved for them in the Provincial and Central Legislatures.

(iii) The seats reserved for them were to be filled by separate Electorates formed exclusively of voters belonging to the Untouchable Community.

(iv) In addition to having a vote in the Separate Electorates the Untouchables were to have a second or additional vote in the general election for seats open to Hindus other than the Untouchables.

Mr. Gandhi who had been objecting to separate representation of the Untouchables raised a protest against the proposal of the British Government and threatened to fast unto death if these concessions were not withdrawn. Mr. Gandhi's objection was mainly to Separate Electorates and as the British Government refused to withdraw their proposals unless there was an agreement between the Untouchables and the Hindus. Thereupon Mr. Gandhi started his fast. Eventually an agreement was arrived at between the Hindus and the Untouchables in September 1932. That agreement is known as the Poona Pact. Its terms are reproduced below :

POONA PACT *

(1) There shall be seats reserved for the Depressed Classes out of the general electorate seats in the Provincial Legislatures as follows :

Madras 30 : Bombay with Sind 15 ; Punjab 8 ; Bihar and Orissa 18 ; Central Provinces 20 ; Assam 7 ; United Provinces 20 ; Total 148.

These figures are based on the total strength of the Provincial Councils, announced in the Prime Minister's decision.

(2) Election to these seats shall be by joint electorates subject, however, to the following procedure:

All the members of the Depressed Classes registered in the feneral electoral roll in a constituency will form an electoral college, which will elect a panel of four candidates belonging to the Depressed Classes for each of such reserved seats, by the method of the single vote ; the four persons getting the highest number of votes in such primary election, shall be candidates for election by the general electorate.

(3) Representation of the Depressed Classes in the Central Legislature shall likewise be on the principal of joint electorates and reserved seats by the method of primary election in the manner provided for in Clause two above, for their representation in the Provincial Legislatures,

(4) In the Central Legislatures, eighteen per cent of the seats allotted to the general electorate for British India in the said legislature shall be reserved for the Depressed Classes.

(5) The system of primary election to a panel of candidates for election to the Central and Provincial Legislatures, as hereinbefore mentioned, shall come to an end after the first ten years, unless terminated sooner by mutual agreement under the provision of Clause six below.

(6) The system of representation of the Depressed Classes by reserved seats in the Provincial and Central Legislature as provided for in Clauses 1 and 4 shall continue untill determined by mutual agreement between the communities concerned in the settlement.

(7) Franchise for the Central and Provincial Legislatures for the Depressed Classes shall be as indicated in the Lothian Committee Report.

(8) There shall be no disabilities attaching to any one on the ground of his being a member of the Depressed Classes in regard to any elections to local bodies or appointment to the Public Services. Every endeavour shall be made to secure fair representation of the Depressed Classes in these respects, subject to such educational qualifications as may be laid down for appointment to the Public Services.

* Signed on 25th September 1932.

(9) In every province out of the educational grant, an adequate sum shall be earmarked for providing educational facilities to the members of the Depressed Classes.

This pact forms the charter of the political liberty of the Untouchables. The first election . . . . . .

(Left incomplete—ed.)

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WHICH IS WORSE ? SLAVERY OR UNTOUCHABILITY ?

[Dr. Ambedkar has dealt with the subject of Slavery and Untouchability in chapter 3 & 8 of Vol. 5 of this series, under the caption- 'Roots of the Problem' 'Parallel cases'.

We have however now come in possession of a booklet in which there are certain paragraphs which do not find place in Vol. No. V chapter 3 & 8.

The material reproduced here when read together, makes consistent and complete reading. We have also no reason to doubt the genuineness of the material as the publisher of the said booklet Shri Devi Dayal was associated with Dr. Ambedkar during 1943-47. The facsimile of the title at the beginning of the chapter, as printed in the booklet vouchsafe the authorship of Dr. Ambedkar. Earlier paragraphs in the booklet i.e. from page 1 to 11 upto 'considerations of humanity' are already printed in Vol. 5 at page nos. 80 to 88. Mr. Bhagwandas of Delhi deserves credit for publishing this article for Mr. Devi Dayal—Editor]

Slavery in India

Among the claims made by the Hindus for asserting their superiority over other nations the following two are mentioned. One is that there was no slavery in India among the Hindus and the other is that Untouchability is infinitely less harmful than slavery.

The first statement is of course untrue. Slavery is a very ancient institution of the Hindus. It is recognized by Manu, the law giver and has been elaborated and systematized by the other Smriti writers who followed Manu. Slavery among the Hindus was never merely ancient instititution which functioned only in some hoary past. It was an institution which continued throughout all Indian history down to the year 1843 and, if it had not been abolished by the British Government by law in that year, it might have continued even today. While slavery lasted it applied to both the touchables as well as the untouchables.

The untouchables by reason of their poverty became subject to slavery oftener than did the touchables. So that up to 1843 the untouchables in India had to undergo the misfortune of being held in double bondage-the bondage of slavery and the bondage of untouchability. The lighter of the bonds has been cut and the untouchable is made free from it. But because the untouchables of today are not seen wearing the chains of slavery on them, it is not to be supposed that they never did. To do so would be to tear off whole pages of history.

The first claim is not so widely made. But the second is. So great a social reformer and so great a friend of the untouchables as Lala Lajpat Rai in replying[1] to the indictment of the Hindu Society by Miss Mayo insisted that untouchability as an evil was nothing as compared with slavery and he fortified his conclusion by a comparison of the Negro in America with the untouchables in India and showed that his conclusion was true. Coming as it does from Lala Lajpat Rai the matter needs to be more closely examined.

Is untouchability less harmful than slavery ? Was slavery less human than untouchability ? Did slavery hamper the growth more than untouchability does ? Apart from the controversy raised by Lala Lajpat Rai, the questions are important and their discussions will be both interesting and instructive. To understand this difference it is necessary to begin by stating the precise meaning of the term slavery. This is imperative because the term slavery is also used in a metaphorical sense to cover social relationship which is kindered to slavery but which is not slavery. Because the wife was entirely in the power of the husband, because he sometimes ill-used her and killed her, because the husband exchanged or lent his wife and because he made her work for him, the wife was sometimes spoken of as a slave. Another illustration of the metaphorical use of the term is its application to serfs. Because a serf worked on fixed days, performed fixed services, paid fixed sums to the lord and was fixed to the land, he was spoken of as a slave. These are instances of curtailment of freedom, and inasmuch as they are akin to slavery because slavery

[1] Unhappy India.

also involves loss of freedom. But this is not the sense in which the word is used in law, and to avoid arguing at cross purpose, it would be better to base the comparison on the legal meaning of the word slavery.

In layman's language, a person is said to be slave when he is the property of another. This definition is perhaps too terse for the lay reader. He may not understand the full import of it without further explanation. Property means something, a term which is used to denote a bundle of rights which a person has over something which is his property, such as the right to possess, to use, to claim the benefit of, to transfer by way of sale, mortgage or lease and destroy. Ownership therefore means complete dominion over property. To put it concretely, when it is said that the slave is the property of the master, what it means is that the master can make the slave work against his will, take the benefit of whatever the slave produces without the consent of the slave. The master can lease out, sell or mortgage his slave without consulting the wishes of the slave and the master can even kill him in the strictest legal connotation of the term. In the eye of the law the slave is just a material object with which his master may deal in any way he likes.

In the light of this legal definition, slavery does appear to be worse than untouchability. A slave can be sold, mortgaged or leased ; an untouchable cannot be sold, mortgaged or leased. A slave can be killed by the master without being held guilty for murder ; an untouchable cannot be. Whoever causes his death will be liable for murder. In fact, the slave could not be killed with impunity, the law did recognize his death as being culpable homicide as it did in the case of the death of a freeman. But taking the position of the slave as prescribed by laws the difference between the condition of the slave and the untouchable is undoubtedly clear-that the slave was worse off than the untouchable.

There is however another way of defining a slave which is equally legal and precise although it is not the usual way. This other way of defining a slave is this : A slave is a human being who is not a person in the eye of the law. This way of defining a slave may perhaps puzzle some. It may therefore be necessary to state that in the eye of the law the term person is identical with the term human being. In law, there may be human beings whom the law does not regard as persons. Contrariwise there are in law persons

who are not human beings. This curious result arises of the meaning which the law attaches to the word person. For the purposes of law a person is defined as an entity, human or non-human, in whom the law recognized a capacity for acquiring rights and bearing duties. A slave is not a person in the eye of the law although he is a human being. An idol is a person in the eye of the law although an idol is an inanimate object. The reason for this difference will be obvious. A slave is not a person although he is a human being, because the law does not regard him as an entity endowed with the capacity for rights and duties. Concisely an idol is a person though not a human being because the law does-whether wisely or not is another question-recognize the capacity for rights and duties. To be recognized as a person is of course a very important fact fraught with tremendous consequences. Whether one is entitled to rights and liberties upon this issue, the rights which flow from this recognition as person are not only as life but are as vital as life. They include right over material things, their acquisition, their enjoyment and their disposal—called right to property. There are others far more important than these rights over material things. Firstly, there is the right in respect of one's own person—a right not to be killed, maimed or injured without due process of law called a right to life, a right not to be imprisoned save in due process of law-called right to liberty. Secondly, there is a right to reputation-a right not to be ridiculed or lowered in the estimation of fellow men, the right to his good name i.e. the right to the respect so far as it is well founded which others feel for him shall not be diminished. Thirdly, there is the right to the free exercise of powers and liberties[1].

[1] There is a distinction between Rights. Powers and Liberties which perhaps need to be explained especially in a treatise intended for the common man. When it is vain that a person has a right it means that it is a duty on some other person either to make the right real by fulfilling his duty or not to injure that right by a wrong doing or non-doing.

There is a distinction between right and liberty which is some times lost by using the word right in a wider sense so as to include liberty. For instance ibis said that a person has a right i.e. he is at liberty to do as he pleases with his own ; but this omits to take into account that a person has no right and he is not at liberty to interfere with the liberty of another. The distinction between right and liberty may be stated thus ; Rights of person are concerned with things which other persons "ought" to do for him. Liberties of a person are concerned with things he 'may' do for himself.

Liberties are acts which a person may do without being restrained by the law. The sphere of a person's legal liberty is that sphere of activity within which the law is content to leave him alone.

Every person is entitled without molestation to perform all lawful acts and to enjoy all the privileges which attach to him as a person. The most specific right of this kind is to be the unmolested pursuit of the occupation by which a man chooses to gain his livelihood. Under the same head falls the right of every person to the free use of the public highways, of navigable rivers and all public utilities. It also includes the right of every person that the machinery of the law, which is established for the protection of all persons shall not be maliciously set in motion to his detriment. Thirdly, there is the right of immunity from damage by fraud or coercion-it is a right not to be induced by fraud to assent to a transaction which causes damage, and not to be coerced into acting contrary to one's desire by force. Fourthly, the rights of a person are those which are collectively called Family Rights. These family rights may be distinguished as 'marital', 'parental', 'tutelary', and 'dominical'. The marital right, the right of a husband as against the world, is that no other man shall, by force or persuasion, deprive him of his wife's society, still less be criminally intimate with her. An analogous right might conceivably be recognized as being vested in the wife and is recognized in parts of America. The parental right extends to the custody and control of children, to the produce of their labour till they arrive at the age of discretion without interference. The tutelary right is the right of the parent to act as the guardian not for the benefit of the guardian but for that of the ward. . . . . whose want of understanding he supplements and whose affairs he manages. The dominical right is the right to use labour of the ward. The right is infringed by killing, by injuring so as to make him less valuable or by enticing him away.

Not being a person, a slave had, so far as law is concerned, none of these rights. The untouchable is a person in the eye of the law. It cannot therefore be said that he has none of the rights which the law gives to a 'person'. He has the right to property, to life, liberty, reputation, family and to the free exercise of his liberties and his powers. Define the slave as one may, either as a piece of property or as one who is not a person, it appears that the slave was worse off than the untouchable.

This is so if we consider only the *de jure* position of the slave. Let us consider what was the *de facto* position of the slave in the Roman Empire and in the United States. I take the following extracts from Mr. Barrow[1] :

> "Hitherto, it is the repulsive side of household slavery that has been sketched. There is also another aspect. The literature reveals the vast household as normal. It is, of course, the exception. Large slave staffs undoubtedly existed, and they are generally to be found in Rome. In Italy and the Provinces there was less need of display ; many of the staff of the Villa were engaged in productive work connected with land and its produce. The old-fashioned relationship between foreman and slave remained there; the slave was often a fellow worker. The kindliness of Pliny towards his staff is well-known. It is in no spirit of self-righteousness and in no wish to appear in a favour able light in the eyes of the future generations which he hoped would read his. letters that he tells of his distress at the illness and death of his slaves. The household (of Pliny) is the salves' republic. Pliny's account of his treatment of his slaves is sometimes regarded as so much in advance of general or even occasional practice as to be valueless as evidence. There is no reason for this attitude.
>
> From reasons both of display and genuine literary interest, the rich families attached to their households, slaves trained in literature and art. Calvisices Sabinus is said by Seneca to have had eleven slaves taught to recite Homer, Hesioid, and nine lyric poets by heart. 'Book cases would be cheaper', said a rude friend. 'No, what the household knows the master knows 'was the answer. But, apart from such abuses, educated slaves must have been a necessity in the absence of printing;. . . . . The busy lawyer, the dilettante poet, the philosopher and educated gentlemen of literary tastes had need of copyists and readers and secretaries. Such men were naturally linquistic also; a librarius who dies at the age of twenty boasts that he was '*literatus Graecis at Latinis*'. *Amanuensis* were common enough ; librarians are to be found in public and private

[1] Slavery in the Roman Empire, pp. 47-49

libraries. . . . .Shorthand writing was in common use under the Empire, and slave Notary were regularly employed. . . .

Many freemen, rhetoricians and grammarians are collected by Snetonius in a special treatise. Verrius Flaccus was tutor to Austus's grandsons, and at death was publicly honoured by a statue. Scribonius Aphrodisius was the slave and disciple of Orbilius and was afterwards freed by Scribenia. Hyginus was librarian of the Palatine Library, in which office he was followed by Jullius Modestus, his own freedman. We hear of freedmen historians of a slave philosopher who was encouraged to argue with his master's, friends' slaves and freed architects, Freemen as doctors occur frequently in the inscriptions, some of them specialists ; they had been trained in big households as slaves, as is shown by one or two examples; after Manumission they rose to eminence and became notorious for their high fees."

"The tastes of some section of society demanded that dancers, singers, musicians, montebanks, variety artists, athletic trainers and messeiurs should be forthcoming. All these are to be found in slavery, often trained by teachers who had acquired some reputation"[1].

* * * *

"The age of Augustus was the beginning of a period of commercial and industrial expansion. . . . . slaves had indeed been employed (in arts and crafts) before, but the sudden growth of trade. . . .their employment in numbers that would otherwise have been unnecessary. Romans engaged more freely and more openly in various forms of commercial and industrial venture. Yet, even so the agent became more important, for commercial activities became more widespread; and such agents were almost necessarily slaves.....(this is so) because the bonds of slavery (are elastic). They could be so relaxed as to offer an incentive (to the slave) to work by the prospect of wealth and freedom, and so tightened as to provide a guarantee to the master against loss from the misconduct of his slave. In business contracts between slave and master third person seem to have been common, and the work thus done, and no doubt, the profits

[1] Slavery in the Roman Empire, p. 63.

were considerable. . . . . Renting of land to the slave has already been noticed. . . . and in industry much the same system was used in various forms; the master might lease a bank, or a business of the use of a ship, the terms being a fixed return or the slave being paid on a commission basis"[1].

"The earnings of the slave became in law his peculium. Once the peculium was saved it might be used to a variety of purposes. No doubt in many cases this fund was expended in providing food or pleasure..... But peculium must not be regarded merely as petty savings, casually earned and idly spent. The slave who made his master's business yield profits, to his own profit too, very often, had a keen sense of the best use to make up his own money. Often he reinvested it in his master's business or in enterprises entirely unrelated to it. He could enter into business relations with his master, from whom he came to be regarded as entirely distinct, or he could make contracts with a third person. He could even have procurators to manage his own property and interests. And so with the peculium may be found not only land, houses, shops but rights and claims.

"The activities of slaves in commerce are innumerable; numbers of them are shopkeepers selling every variety of food, bread, meat, salt, fish, wine vegetables, beans, Aupine-seed, honey, curd, ham, ducks and fresh fish, others deal in clothing—sandals, shoes, gowns and mantles. In Rome, they plied their trade in the neighbourhood of the Circus Maximus, or the Porticus Trigeminus; or the Esquiline Market, or the Great Mart (on the Caolian Hill) or the Suburra[2] . . . . .

The extent to which slave secretaries and agents acted for their masters is shown very clearly in the receipts found in the house of Caecilius Jucundus at Pompei[3].

That the State should possess slaves is not surprising; war, after all, was the affair of the State and the captive might well be State-property. What is surprising is the remarkable use made of public slaves under the Empire and the extraordinary social position occupied by them. . . . . "

[1] Slavery in the Roman Empire, pp. 101-102.

[2] Ibid, p. 105.

[3] Slavery in the Roman Empire, p. 106.

> "Public slave came to mean before the Empire a slave of the state employed in its many offices, and the term implied a given occupation and often social position. The work of slaves of the State, slaves of the townships, and slaves of Caesar comprises much of what would now fall to parts of the higher and the whole of the lower branches of the civil services and of the servants of Municipal Corporations, working both with head and hands... In the subordinate levels (of the Treasury) there worked numbers of clerks and financial officers, all freedmen and slaves. The business dealt with must have been of vast range. ... The Mint . . . the immediate head was a knight, in charge of the minting processes . . . . a freed man was placed under him, served freedmen and slaves.... From one branch of State service, at any rate, slaves were rigorously excluded, except on one or two occasions of exceptional stress. They were not allowed to fight in the Army because they were not thought worthy of honour. Doubtless other motives were present also; it would be dangerous experiment to train too many slaves systematically in the use of Arms. If, however, slaves served merely in the fighting line, they are regularly to be found in great numbers behind it employed as servants, and in the commissariat and transport. In the fleet slaves were common enough[1]."

Such was the *de facto* position of the slave in Roman Society. Let us trun to the *de facto* position of the Negro in the United States during the period in which he was slave in the eye of the law. Here are some facts[2] which shed a good deal of light on his position :

> "Lafayette himself had observed that white and black seamen and soldiers had fought and messed together in the Revolution without bitter difference. Down in Granville County, North Carolina, a full blooded Negro, John Chavis, educated in Princeton University, was conducting a private school for white students and was a licentiate under the local Presbytary, preaching to white congregations in the State. One of his pupils became Governor of North Carolina, another the State's most prominent Whig senator. Two of his pupils were sons of the Chief Justice

1 *Ibid,, pp.* 130-147.

2 Charles C. Johnson's '*The Negro in American Civilisation*'.

of North Carolina. The father of the founder of the greatest military academy of the State attended his school and boarded in his home....

Slave labour was used for all kinds of work and the more intelligent of the Negro slaves were trained as artisans to be used and leased. Slave artisans would bring twice as much as an ordinary field hand in the market. Master craftsmen owned their staff. Some masters, as the system became more involved, hired slaves to their slave artisans. Many slave artisans purchased their freedom by the savings allowed them above the normal labour expected."

"The advertisements for runaways and sales are an index to this skill. They received the same or better wages than the poor white labourer and with the influence of the master got the best jobs. The Contractors for masons' and carpenters' work in Athens, Georgia in 1838 were petitioned to stop showing preference to Negro labourers. "The white man is the only real, legal, moral, and civil proprietor of this country and state. The right of his proprietorship reached from the date of the studies of those whitemen. Copernicus and Galileo, who indicated the sphericity of the earth; which sphericity hinted to another white man, Columbus, the possibility by a westerly course of sailing, of finding land. Hence by whitemen alone was this continent discovered, the whitemen alone, aye, those to whom you decline to give money for bread or clothes for their famishing families, in the logical manner of withholding work from them defending Negroes too in the bargain." In Atlanta in 1858, a petition signed by 2 white mechanics and labourers sought protection against the black slave artisans of masters who resided in other sections. The very next year sundry white citizens were aggrieved that the City Council tolerated a Negro dentist to remain and operate in their midst. 'Injustice to ourselves and the community it ought to be abated. We, the residents of Atlanta, appeal to you for justice'. A Census of free Negroes in Richmond County, Georgia, in 1819 showed carpenters, barbers, boatcorkers, saddlers, spinners, millwrights, holsters, weavers, harness makers, sawmill attendants and steamboat

pilots. A Negro shoe-maker made by hand the boots in which President Munrow was inaugurated. Harriet Martineau marvelled at the slave workmanship in the delicately tiled floors of Thomas Jefferson's home at Monticello. There still stands in the big house of the old plantation, heavy marks of the hands of these Negro craftsmen, strong mansions built of timber hewn from the original oak and pinned together by wooden pins. Negro women skilled in spinning and weaving worked in the mills. Buckingham in 1839 found them in Athens. Georgia, working alongside with white girls without apparent repugnance of objection.

Negro craftsmen in the South, slave and free fared better than their brothers in the North. In 1856 in Philadelphia, of 1637 Negro craftsmen recorded, less than two-thirds could use their trades; 'because of hostile prejudice'. The Irish who were pouring into America from the very beginning of the nineteenth century were being used in the North on approximately the same motives of preference which governed Negro slavery. 'An Irish Catholic', it was argued in their favour, 'seldom attempts to rise to a higher condition than that in which he is placed, while the Negro often makes the attempt with success. Had not the old Puritan Oliver Cromwell, while the traffic in black slaves was on, sold all the Irish not killed in the Drogheda Massacre into Barbados ?' Free and fugitive Negroes in New York and Pennsylvania were in constant conflict with this group and the bitter hostility showed itself most violently in the draft riots of the New York. These Hibernians controlled the load carrying and the common labour jobs, opposing every approach of the Negro as a menace to their slight hold upon America and upon a means of livelihood."

Such was the *de facto* condition of the Roman slave and the American Negro slave. Is there anything in the condition of the Untouchables of India which is comparable with the condition of the Roman slave and the American Negro slave ? It would not be unfair to take the same period of time for comparing the condition of the Untouchables with that of the slaves under the Roman Empire. But I am prepared to allow the comparison of the condition of the slaves in the Roman Empire to be made with the

condition of the Untouchables of the present day. It is a comparison between the worst of one side and the best of the other, for the present times are supposed to be the golden age for the Untouchables. How does the *de facto* condition of the Untouchables compare with the *de facto* condition of the slaves ? How many Untouchables are engaged as the slaves in Rome were, in professions such as those of Librarians, Amanuenses, Shorthand writers ? How many Untouchables are engaged, as the slaves in Rome were, in such intellectual occupations as those of rhetoricians, grammarians, philosophers, tutors, doctors and artists ? How many untouchables are engaged in trade, commerce or industry as were the slaves in Rome ? Even comparing his position with that of the Negro while he was a slave it cannot be said that the condition of the Untouchable has been better. Is their any instance of untouchables having been artisans ? Is there any instance of untouchable having maintained a school where Brahmin children have come to sit at his feet in search of learning ? Why such a thing is unthinkable ? But it has happened in the United States of America. In comparing the *de facto* condition of the Roman slave and the American Negro I have purposely taken the recent condition of the Untouchables as a basis of comparison for the simple reason that the present times are supposed to be the golden age for the untouchables. But comparing even the condition of the untouchables in modern times they are certainly a sunken community as compared with the condition of slaves in time which historians call barbarous. There can therefore, be no doubt that untouclables have been worse off than slaves. This of course means that untouchability is more harmful to the growth of man than slavery ever was. On this there is a paradox. Slaves who were worse off in law than the untouchables were in fact better off than untouchables and untouchables who were better off in law than slaves were worse off in fact than slaves. What is the explanation of this paradox ? The question of all questions is this ; what is it which helped the slave to overcome the rigorous denial of freedom by law and enabled them to prosper and grow ? What is it that destroyed the effect of the freedom which the law gave to the untouchables and sapped his life of all vitality and stunted his growth.

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The explanation of this paradox is quite simple. It will be easily understood if one bears in mind the relation between law and public opinion, Law and public opinion are two forces which govern the conduct of men. They act and react upon each other. At times law goes ahead of public opinion and checks it and redirects in channels which it thinks proper. At times public opinion is ahead of the law. It rectifies the rigour of the law and moderates it. There are also cases where law and public opinion are opposed to each other and public opinion being the stronger of the two forces, disregards or sets at naught what the law-prescribes. Whether through compulsion arising out of convenience of commerce and industry or out of the selfish desire to make the best and the most profitable use of the slaves or out of considerations of humanity, public opinion and law were not in accord with regard to the position of the slave either in Rome or in the United States. In both places the slave was not a legal person in the eye of the law. But in both places he remained a person in the sense of a human being in the eye of the society. To put it differently the personality which the law withheld from the slave was bestowed upon him by society. There lies a profound difference between slavery and untouchability. In the case of the untouchable just the opposite has happened; The personality which the law bestowed upon the untouchables is withheld by society. In the case of the slave the law by refusing to recognize him as a person could do him no harm because society recognized him more amply than it was called upon to do. In the case of the untouchables the law by recognising him as a person failed to do him any good because Hindu society is determined to set that recognition at naught. A slave had a personality which counted notwithstanding the command of the law. An untouchable has no personality in spite of the command of the law. This distinction is fundamental. It alone can explain the paradox—the social elevation of the slave loaded though he was with the burden of legal bondage and the social degradation of the untouchable aided as he has been with the advantages of legal freedom.

Those who have condemned slavery have no doubt forgotten to take into consideration the fact that in a sense slavery was

an apprenticeship in a business, craft or art, albeit compulsory. Unmitigated slavery with nothing to compensate the loss of freedom is of course to be condemned. But to enslave a person and to train him is certainly better than a state of barbarity accompanied by freedom. Slavery did mean an exchange of semi-barbarism for civilization, a vague enough gift but none the less real. The full opportunities for civilized life could only be fully used in freedom, no doubt, but slavery was an apprenticeship, or in the words of Prof. Myres "an initiation into a higher culture".

This view of slavery is eminently a correct view. This training, this initiation of culture was undoubtedly a great benefit to the slave. Equally it involved considerable cost to the master to train his slave, to initiate him into culture. "There can have been little supply of slaves, educated or trained, before enslavement. The alternative was to train them when young slaves in domestic work or in skilled craft, as was indeed done to some extent before the Empire, by Cato, the Elder, for example. The training was done by his owner and his existing staff indeed the household of the rich contained special pedagogy for this purpose. Such training took many forms : industry, trade, arts and letter".

The question is why was the slave initiated into the high culture and why did it not fall to the lot of the untouchable to be so initiated ? The question is very pertinent and I have raised it because the answer to the question will further reinforce the conclusion that has been reached namely that untouchability is worse than slavery and that is because the slave had a personality and the untouchable has not.

The reason why the master took so much trouble to train the slave and to initiate him in the higher forms of labour and culture was undoubtedly the motive of gain. A skilled slave as an item was more valuable than an unskilled slave. If sold he would fetch better price, if hired out he would bring in more wages. It was therefore an Investment to the owner to train his slave. But this is not enough to account for the elevation of the slave and the degradation of the untouchable. Suppose Roman society had an objection to buy vegetables, milk, butter, water or wine from the hands of the slave ? Suppose Roman society had an objection to

allow slaves to touch them, to enter their houses, travel with them in cars, etc. would it have been possible for the master to train his slave, to raise him from semi-barbarism to a cultured state ? Obviously not. It is because the slave was not held to be an untouchable that the master could train him and raise him. We again come back therefore, to the same conclusion-namely, that what has saved the slave is that his personality was recognised by society and what has ruined the untouchable is that Hindu society did not recognize his personality, treated him as unfit for human association and common dealing.

That the slave in Rome was no less of a man because he was a slave, that he was fit for human intercourse although he was in bondage is proved by the attitude that the Roman Religion had towards the slave. As has been observed—

> ".....Roman religion was never hostile to the slave. It did not close the temple doors against him ; it did not banish him from its festivals. If slaves were excluded from certain ceremonies, the same may be said of free men and women-being excluded from the rites of Bono Dea, Vesta and Ceres, women from those of Hercules at the Ara Maxima. In the days when the old Roman divinities counted for some-thing, the slave came to be informally included in the family, and could consider himself under the protection of the gods of the household .....Augustus ordered that freed women should be eligible as priestesses of Vesta. The law insisted that a slave's grave should be regarded as sacred and for his soul Roman mythology provided no special heaven and no particular hell. Even Juvenal agrees that the slave, soul and body is made of the same stuff as his master..."

SLAVE IN LAW

There was no stigma attached to his person. There was no gulf social or religious which separated the slave at any rate in Rome from the rest of the society. In outward appearance he did not differ from the free man ; neither colour nor clothing revealed his conditions ; he witnessed the same games as the freemen, he shared in the life of the Municipal towns, and employed in state service, enaged himself in trade and commerce as all free men

did. Often apparent equality in outward things counts far more to the individual than actual identify of rights before the Jaw. Between the slave and the free, there seems often to have been little social barrier. Marriage between slave and freed slave was very common. The slave status carried no stigma on the man in the society. He was touchable and even respectable.

Enough has been said to show that untouchability is worse than slavery. The only thing that is comparable to it is the case of the Jews in the middle ages. The servility of the Jews does resemble to some extent the condition of the untouchables. But there is this to be said about it. Firstly the discrimination made against the Jews was made upon a basis which is perfectly understandable though not justifiable. It was based upon the Jews obstinacy in the matter of religion. He refused to accept the religion of the gentiles and it is his obstinacy which brought about those penalties. The moment he gave up his obstinacy he was free from his disabilities. This is not the case with the untouchable. His disabilities are not due to the fact that he is a protestant or nonconformist. The second thing to be said about these disabilities of the Jews is that the Jews preferred them to being completely assimilated and lost in the Gentiles. This may appear strange but there are facts to prove it. In this, connection reference may be made to two instances recorded in history which typify the attitude of the Jews. The first instance relates to the Napoleonic regime. After the National Assembly of France had agreed to the declaration of the Rights of Man to the Jews, the Jewish question was again reopened by the guild merchants and religious reactionaries of Alsace. Napoleon resolved to submit the question to the consideration of the Jews themselves.

"He convened an Assembly of Jewish Notables of France, Germany and Italy in order to ascertain whether the principles of Judaism were compatible with the requirements of citizenship as he wished to fuse the Jewish element with the dominant population. The Assembly, consisting of 111 deputies, met in the Town Hall of Paris on 25th July, 1806, and was required to frame replies to twelve questions relating mainly to the possiblity of Jewish patriotism, the permissiblity of intermarriage between

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Jew and non-Jew, and the legality of usury. So pleased was Napoleon with the pronouncements of the Assembly that he summoned a Sanhedrin after the model of the ancient council of Jerusalem to convert them into the decrees of a legislative body. The Sanhedrin, comprising 71 deputies from France, Germany, Holland and Italy, met under the presidency of Rabbi Sinzheim of Strassburg on 9th February 1807, and adopted a sort of charter which exhorted the Jews to look upon France as their father land, to regard its citizens as their brethren, and to speak its language, and which also pressed toleration of marriages between Jews and Christians while declaring that they could not be sanctioned by the synagogue". It will be noted the Jews refused to sanction intermarriages between Jews and non-Jews. They only agreed to tolerate them. The second instance related to what happend when the Batavian Republic was established in 1795. The more energetic members of the Jewish community pressed for the removal of many disabilities under which they laboured. "But the demand for the full rights of citizenship made by the progressive Jews was at first, strangely enough, opposed by the leaders of the Amsterdam community, who feared that civil equality would militate against the conservation of Judaism and declared that their co-religionists renounced their rights of citizenship in obedience to the dictates of their faith. This shows that the Jews preferred to live as strangers rather than as members of the community. It is as an 'eternal people' that they were singled out and punished. But that is not the case with the untouchables. They too are in a different sense art "eternal people" who are separate from the rest. But this separateness is not the result of their wish. They are punished not because they do not want to mix. They are punished because they want to.

Untouchability is worse than slavery because slave has personality in the Society while the untouchable has no personality has been made abundantly clear. But this is not the only ground why untouchability is worse than slavery. There are others which are not obvious but which are real none-the-less.

Of these the least obvious may be mentioned as the first. Slavery, if it took away the freedom of the slave, it imposed upon the master the duty to maintain the slave in life and body. The slave was relieved of all responsibility in respect of his food, his clothes and his shelter. All this the master was bound to provide. This was of course no burden because the slave earned more than his keep. But a security for board and lodging is not always possible forevery freeman as all wage earners now know to their cost. Work is not always available even to those who are ready to toil but a workman cannot escape the rule according to which he gets no bread if he finds no work. This rule, no work no bread, the ebbs and tides of business, the booms and depression are vissicitudes through which all free wage earners have to go. But they do not affect the slave who is free from them. He gets his bread-perhaps the same bread, but bread-whether it is boom or whether it is depression. Untouchability is worse than slavery because it carries no such security as to livelihood as the latter does. No one is responsible for the feeding, housing and clothing of the untouchable. From this point of view untouchability is not only worse than slavery but is positively cruel as compared to slavery. In slavery the master has the obligation to find work for the slave. In a system of free labour workers have to compete with workers for obtaining work. In this scramble for work what chances has the untouchable for a fair deal ? To put it shortly in this competition with the scales always weighing against him by reason of his social stigma he is the last to be employed and the first to be fired. Untouchability is cruelty as compared to slavery because it throws upon the untouchables the responssibility for maintaining without any way of earning his living. From another aspect also untouchability is worse than slavery. The slave was property, and that gave the slave an advantage over a free man. Being valuable, the master out of sheer self interest, took great care of the health and well being of the slave. In Rome the slaves were never employed on marshy and malarial land. On such a land only freemen were employed. Cato advises Roman farmers never to employ slaves on marshy and malarial land. This seems stranger. But a little examination will show that this was quite natural. Slave was valuable property and as such a prudent man

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who knows his interest must not expose him to the ravages of malaria. The same care need not be taken in the case of free man because he is not valuable property. This consideration resulted to the great benefit of the slave. He was cared for as no one was. This consideration is completely absent in the case of the untouchable. He is neglected and left to starve and die.

The second or rather the third difference between untouchability and slavery is that slavery was never obligatory. But untouchability is obliged. A person is "permitted" to hold another as his slave. There is no compulsion on him if he does not want to. A Hindu on the other hand is "enjoined" to hold another as untouchable. There is compulsion on the Hindu which he cannot escape whatever his personal wishes in the matter may be.

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